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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

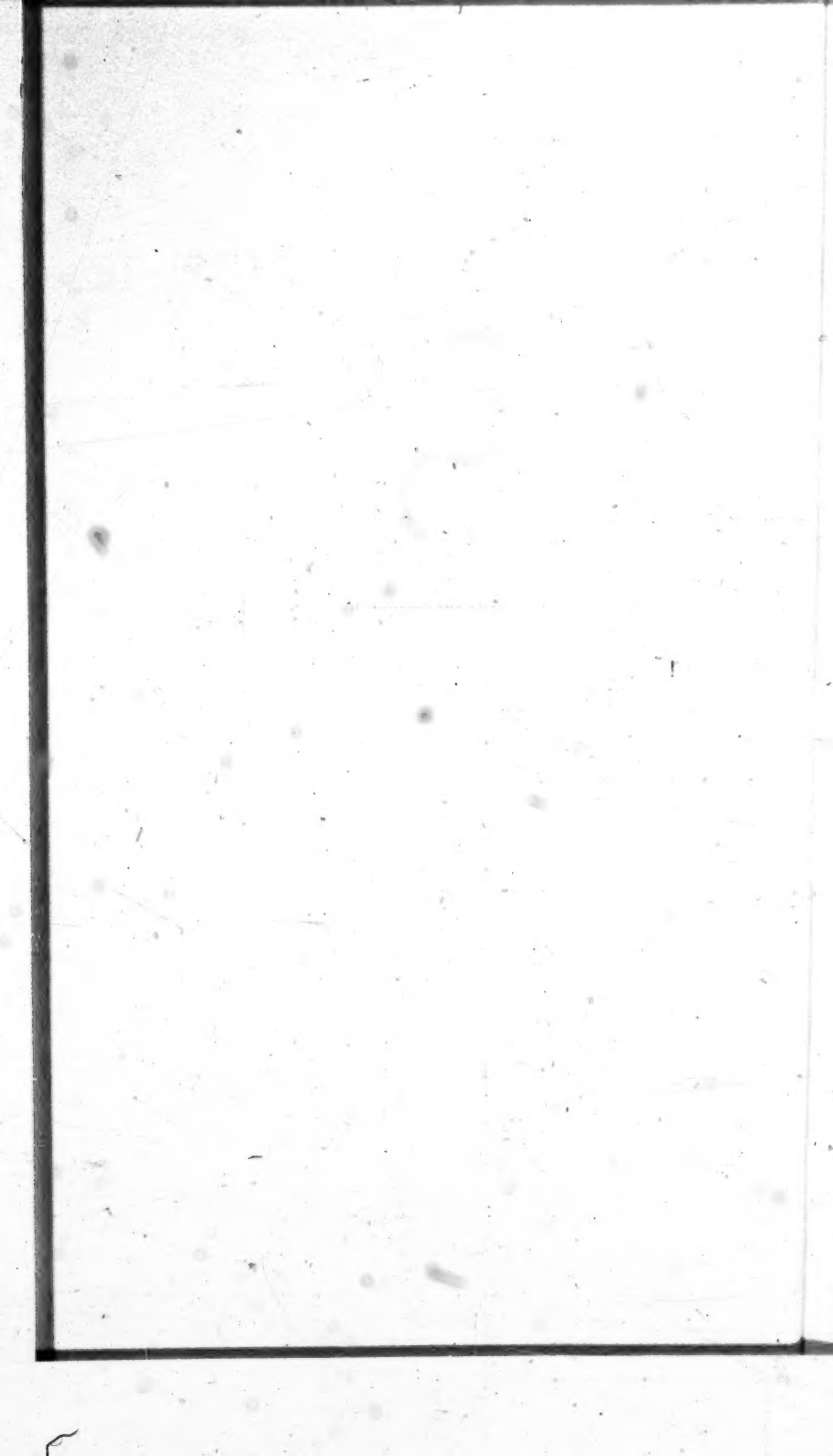
CHRISTENFIELD COUNTY SCHOOL BOARD
AND DR. ROBERT F. KELLY, *Respondents*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1973
CERTIORARI GRANTED APRIL 23, 1973

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 71-1707

MRS. SUSAN COHEN,

Appellee,

v.

CHESTERFIELD COUNTY SCHOOL BOARD, et. al.

Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION**

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343 (3). This suit is in equity for injunctive relief and damages authorized and instituted pursuant to 42 U.S.C. Section 1983. The jurisdiction of this Court is invoked to secure the protection of civil rights and to redress the deprivation of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States and Title VII of Public Law 88-352 known as the Civil Rights Act of 1964.

2. Plaintiff, Susan Cohen, is a social studies teacher employed by the Chesterfield County School Board in Chester-

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field County in the State of Virginia. At the present time, she teaches classes in Senior Government at Midlothian High School in Chesterfield County. She is a citizen of the State of Virginia and of the United States.

3. Defendant, Chesterfield County School Board, is the body vested by Article IX, Section 133 of the Constitution of the State of Virginia with the authority for the establishment and operation of public schools for the citizens of Chesterfield County. The School Board has primary authority over the hiring and termination of employment of teaching personnel in Chesterfield County Schools.

4. Defendant, Dr. Robert F. Kelly, is Division Superintendent of the Chesterfield County School Board. He is charged with authority to administer and regulate the affairs of Chesterfield County Schools. Dr. Kelly is, by information and belief, a citizen of the State of Virginia and of the United States.

5. On May 15, 1970, plaintiff and defendant Chesterfield County School Board entered into an employment contract for the services of plaintiff as a teacher in the Social Studies Department at Midlothian High School in Chesterfield County for the period of August, 1970 through June, 1971. In Clause 3 of this contract plaintiff agreed to comply with all school laws, State Board of Education regulations, and all rules and regulations made by defendant School Board in accordance with law and State Board of Education regulations and shall make promptly and accurately all reports required by the division superintendent. [Original attached]

6. On or about October 28, 1970, plaintiff sent a letter to defendant School Board as required by Paragraph 5(a) of "Absentee and Sick Leave Policy" of the Personnel Policy Manual of the Chesterfield County School Board and by

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Clause 3 of her contract with defendant. In this letter, plaintiff informed defendant school Board that she was pregnant and that her due date was on or about April 28, 1971. Plaintiff requested that her maternity leave take effect on April 1, 1971.

7. On November 6, 1970, Mr. G. H. Bruce, Jr., Director of Secondary Personnel for the Chesterfield County School Board wrote plaintiff that her employment as a school teacher would be terminated as of December 18, 1970. [Original attached]

8. At this point, plaintiff would be in her fifth month of pregnancy.

9. On November 16, 1970, Mr. Bruce informed plaintiff in writing that the School Board had considered her case at its November 11, 1970 meeting and had denied her request that her termination date be extended until April 1, 1971. [Attached]

10. On November 18, 1970, plaintiff spoke via telephone with defendant Dr. Robert F. Kelly, and plaintiff requested an appearance before the School Board regarding the termination of employment. Dr. Kelly told her that she may appear at the November 25, 1970 meeting.

11. On November 25, 1970, plaintiff appeared before defendant School Board. After presenting letters from her gynecologist, Dr. Frank S. Knight, M.D. and her principal, Mr. John R. Kopko that her termination date be extended beyond the December 18th deadline, plaintiff was told orally by the School Board that her request had been denied.

12. In notifying defendants in writing of her pregnancy, plaintiff fully complied with the rules and regulations of the School Board.

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13. Plaintiff's request for maternity leave was ineffective since under Paragraph 5 (c) (1) of the Absentee and Sick Leave Policy, maternity leave "must be requested in writing at the time of termination of employment." [Copy attached]

14. Under the School Board regulations, Paragraph 5 (c) (1), maternity leave can be requested and considered only after the employment of plaintiff has been terminated. Therefore, the termination of plaintiff's employment represented an arbitrary dismissal of her services rather than an acceptance of her resignation or a placement of plaintiff on maternity leave.

15. In terminating the employment of plaintiff, defendants have denied plaintiff the right to due process of law as secured by the Fourteenth Amendment to the Constitution of the United States and by the Code of the State of Virginia.

16. Plaintiff was not given written notice or notice by personal interview of the reasons for dismissal and her right to request a hearing before the School Board as required by Section 22-217.6 of the Code of Virginia.

17. Plaintiff was not allowed to appear at the November 12, 1970 School Board meeting where her case was considered, nor was she told of her right to have counsel present at such hearing.

18. Plaintiff was not given at least 15 days written notice of the time and place of either the November 12, 1970 or November 25, 1970 School Board meetings as required by Section 22-217.7 of the Code of Virginia.

19. Plaintiff was not given written notice of the decision of the School Board and a transcript of the School Board meeting as required by Section 22-217.8 of the Code of Virginia.

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20. In terminating the employment of plaintiff, defendants have exceeded their authority under Section 22-217.5 of the Code of Virginia which prescribes the grounds for dismissal of a teacher: "Teachers may be dismissed for the following reasons: incompetency, immorality, noncompliance with the school laws and regulations, disability as shown by competent medical evidence, or for other good and just cause."

21. Defendants have made no showing that the fact that plaintiff is more than 5 months pregnant will in any manner affect her capability or performance as a teacher or in any manner be detrimental to the students or school itself. By arbitrarily terminating plaintiff's employment on the sole basis that she is pregnant, defendants have violated plaintiff's right to due process and equal protection of the law as secured by the Fourteenth Amendment to the Constitution of the United States.

22. The regulation of the School Board of Chesterfield County that the termination of an expectant mother shall become effective at least four months prior to the expected birth of the child is arbitrary and discriminatory against plaintiff and women in general. This regulation prescribes grounds for discharge based on conditions of sex alone and does not require any showing of just cause or reason that a pregnant woman is incapable of performing her functions of employment as a school teacher. This discrimination on the basis of sex is an unfair employment practice under the provisions of Title VII of Public Law 88-352 known as the "Civil Rights Act of 1964."

23. This discrimination is carried on under color of state law and under color of custom and usage required and enforced by officials of the State of Virginia and political sub-

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divisions thereof. Such discrimination by defendants has deprived plaintiff of her right to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States and constitutes a deprivation of plaintiff's liberty and property as secured by the Fourteenth Amendment.

24. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for an injunction and declaratory judgment is the only manner of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from defendants' acts or policy of discrimination and denial of due process unless relief is provided by this court.

25. By virtue of defendants' acts, plaintiff will suffer irreparable harm and injury. Plaintiff will lose her employment status as a school teacher, and at this late date in the school year she will be unable to find other similar employment.

26. Furthermore, when she is forced to leave teaching on December 18, 1970, plaintiff will lose a full year of teaching credit which she would be due had she been allowed to complete the semester and continue teaching for at least one day thereafter. This loss of teaching credit will deprive plaintiff of incalculable funds during the course of her teaching career and will impede her chances of future advancement and promotion.

WHEREFORE, plaintiff respectfully prays that the court enter judgment for plaintiff as follows:

1. Granting plaintiff an injunction enjoining defendants, their agents, employees, successors, and those acting in concert with them from terminating the employment of plaintiff arbitrarily on the grounds that she is pregnant and requiring that plaintiff be permitted to remain in her position as a

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teacher until such time as her gynecologist shall deem that she is physically unable to continue to teach.

2. Ordering defendants to compensate plaintiff for any salaries lost until such time as plaintiff is restored to her position as a school teacher at Midlothian High School in Chesterfield County, Virginia.

3. Ordering defendants to pay and reimburse plaintiffs for court costs and expenditures and reasonable counsel fees.

4. Granting plaintiffs such other and appropriate relief as the court may deem proper.

MRS. SUSAN COHEN
By Counsel

**MOTION TO DISMISS, PRESENTING DEFENSES
OF LACK OF JURISDICTION AND FAILURE TO
STATE A CLAIM UNDER RULE 12(b)**

Come now the defendants, and each of them, by counsel, who move this Honorable Court as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over the subject matter because the sole basis of the complaint is founded upon a contract entered into voluntarily between the parties to this action and said contract does not abridge or violate any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress.

2. To dismiss the action on the ground that the complaint fails to state a claim against the defendants upon which relief can be granted.

Attorney for Defendants
P. O. Box 25
Chesterfield, Virginia 23832

ANSWER PRESENTING AFFIRMATIVE DEFENSES

Come now the defendants, and each of them, by counsel, and as and for their answer presenting affirmative defenses to the complaint exhibited against them by the plaintiff allege and say:

1. That they deny the allegations set forth in paragraph 1 of the complaint and in defense thereof say that the subject matter of this suit is founded upon a contract voluntarily entered into between the parties.

2. That they admit the allegations set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint except that they deny that notice in writing constitutes "full compliance" with the rules and regulations of the School Board as alleged in paragraph 12 and in further answer to said allegations defendants deny that said allegations raise a constitutional question.

3. That they deny the allegations set forth in paragraph 13 of the complaint and in defense thereof say that plaintiff's request for maternity leave was granted by administrative action pursuant to the terms and conditions of plaintiff's contract of employment with the School Board and said leave is in full force and effect. Said paragraph sets forth conclusory allegations unsupported by facts and does not raise a constitutional question.

4. That they deny the allegations set forth in paragraph 14 of the complaint and in defense thereof say that maternity leave may be requested in writing at any time up to and including the effective date of termination of employment as provided by the contract and the rules thereunder. Said paragraph sets forth conclusory allegations unsupported by facts and does not raise a constitutional question.

5. That they deny the allegations set forth in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the complaint and in defense thereof say that plaintiff's maternity leave was granted and became effective automatically under and by virtue of the terms and conditions of her contract because of pregnancy and not otherwise, as a matter of law; that Sections 22.217.5, 22.217.6, 22.217.7 and 22.217.8 of the Code of Virginia (1950), as amended, have no application to the facts well pleaded in this case and the facts alleged are totally inadequate to invoke said sections as a matter of law; that pregnancy does not constitute a ground for dismissal under any of the aforesaid sections as a matter of law; that by execution of the contract plaintiff expressly and impliedly accepted the benefits extended her under the maternity leave provisions of the contract and accepted the restrictions imposed therein as a matter of law; that in executing the contract plaintiff waived such constitutional rights, if any, that do or may run counter to the terms and conditions of her contract as a matter of law; that the maternity leave provisions of the contract are and represent a special benefit accorded to and enjoyed only by those teachers who become pregnant during the course of their teaching contract as a matter of law; that the maternity leave provisions of the contract are reasonable and based on reasonably calculable physical changes certain to occur in women who become pregnant; and the rules and regulations complained of do not have the force and effect of law and their enforcement is dependent upon a violation or breach of contract none of which are alleged or otherwise evident in this case as a matter of law.

6. That the complaint fails to state a claim against the defendants upon which relief can be granted.

WHEREFORE, the defendant, and each of them respect-

fully pray that the complaint exhibited against them be dismissed and that they be allowed to go hence with their costs and expenses in hand paid.

**ORDER
DENYING DEFENDANT'S MOTIONS**

In accordance with the memorandum of the Court this day filed, it is **ADJUDGED** and **ORDERED** that the Motion to Dismiss for lack of jurisdiction, the Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), 28 U.S.C., and the Motion to Strike be, and the same are hereby, denied.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ ROBERT H. MERTIGE, JR.
United States District Judge

MEMORANDUM

The plaintiff seeks to permanently enjoin the defendants from forcing her to take a leave of absence from her duties as a teacher at Midlothian High School in Chesterfield County after her fifth month of pregnancy. She also seeks damages for any loss she may suffer as a result of the leave of absence.

The defendants filed a Motion to Dismiss based on an alleged lack of jurisdiction over the subject matter of the suit, and for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b), 28 U.S.C. The motions were taken under advisement, and a Motion for a Preliminary Injunction on behalf of the plaintiff was denied. Since that time, the defendants have answered the complaint and filed a Motion to Strike certain paragraphs of the complaint.

The plaintiff contends that the Court has jurisdiction over

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the cause under 28 U.S.C. § 1343(3).¹ The defendants maintain that the cause of action is strictly based upon the contract between the parties, and that no constitutional claim is presented. However, the plaintiff has raised in the complaint that she has been discriminated against in such a manner as to deprive her of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The defendants cite *Pierce v. Somerset Railway*, 171 U.S. 641 (1898), for the proposition that an individual may waive a constitutional right. However, the framers of the Constitution never intended for such a waiver to take place unwittingly, and the mere signing of a contract cannot constitute a waiver of rights protected by the Constitution of the United States.²

Therefore, this Court has jurisdiction over the matter in question under 28 U.S.C. § 1343(3).

The defendants have also moved this Court to dismiss the suit on the ground that no claim has been presented upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The plaintiff claims entitlement to relief under 42 U.S.C. § 1983.³

1. § 1343. Civil Rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. It is interesting to note that in one of the clauses of the contract in question Mrs. Cohen swore allegiance and loyalty to the Constitution of the United States. It seems incongruous that the defendants now seek to maintain that the act of signing the document amounted to a waiver of certain rights under that constitution to which the plaintiff swore allegiance and loyalty.
3. § 1983. Civil action for deprivation of rights

The plaintiff contends that the defendants, acting in their official capacity, have caused her to be deprived of rights guaranteed by the Constitution of the United States. If that contention is correct this Court has the power to order the appropriate relief under 42 U.S.C. § 1983. Thus, the Motion to Dismiss under Rule 12(b)(6) will also be denied.

Finally, the defendants have moved to strike paragraphs 13 through 23 inclusively of the complaint "on the ground that they are and represent bare conclusory allegations not supported by material facts necessary to create a genuine issue and they do not raise constitutional questions." Fed. R. Civ. P. 12(f).

Matter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation. *Augustus v. Board of Public Instruction*, 306 F. 2d 862, 868 (5th Cir. 1962). The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy. *Brown & Williamson Tobacco Corp. v. United States*, 201 F. 2d 819, 822 (6th Cir. 1953).

These statements show the severity with which the courts treat a Motion to Strike. Such a test precludes the striking of the instant paragraphs complained of by the defendants. Therefore, the Motion to Strike will be denied.

An order consistent with the above memorandum will be entered.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

January 19, 1971.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STIPULATION OF FACTS

As and for the defendants' stipulation of the facts in this case, which the plaintiff will not be expected to prove and with the right hereby expressly reserved to introduce evidence and rely upon all additional relevant facts as they develop in the trial of this case, stipulates as follows:

1. That plaintiff is an employee of the Chesterfield County School Board.

2. That plaintiff was first employed as a school teacher by the Chesterfield County School Board for the 1968-1969 school year under and pursuant to the terms and conditions of an employment contract as required by law.

3. That plaintiff was re-employed by the Chesterfield County School Board for the 1969-1970 school year and again re-employed for the 1970-1971 school year under similar, but not identical, contracts as above.

4. That several weeks prior to the effective date of the latter mentioned contract, plaintiff became pregnant and subsequently, on or about November 2, 1970, plaintiff informed the defendant by letter that she was pregnant. She notified the defendant that the estimated due date was April 28, 1971, and she asked that maternity leave be made effective as to her on April 1, 1971, which would be the end of her eighth month of pregnancy.

5. That plaintiff's maternity leave was granted by the defendant effective December 18, 1970, pursuant to the terms and conditions of the maternity leave policy. That plaintiff's request for maternity leave becoming effective April 1, 1971, was denied.

6. That plaintiff requested permission to present her case before the defendant school, which permission was granted

and plaintiff did present her case for extension of time to the defendant school board at their meeting on November 25, 1970. Her request was refused by the school board.

7. That at the time of plaintiff's first employment contract, 1968-1969, she was given a full year's teaching credit for less than a full year's teaching experience.

8. That plaintiff is considered by defendant school board to be an excellent teacher.

Respectfully submitted,
CHESTERFIELD COUNTY SCHOOL BOARD,
et al., Defendants
By _____

of Counsel

MEMORANDUM

Mrs. Susan Cohen, the plaintiff in the above-styled action, complains that a regulation of the Chesterfield County School Board (School Board) which requires her to take a leave of absence from her duties as a teacher in Midlothian High School at the end of her fifth month of pregnancy violates her constitutional rights in that it discriminates against her as a woman, thereby violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.¹ Dr. Robert F. Kelly is Superintendent of the Chesterfield County schools. Jurisdiction is

1. The applicable provision reads, in relevant part, as follows:

Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendation from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

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invoked under 28 U.S.C. § 1343(3), the contention being that defendants' actions violate 42 U.S.C. § 1983.

Mrs. Cohen was first employed as a school teacher by defendant School Board for the 1968-69 school year under and pursuant to the terms and conditions of an employment contract as required by law. She was re-employed by the School Board for the 1969-70 school year and again in 1970-71, under similar, but not identical contracts.²

On or about November 2, 1970, Mrs. Cohen informed the School Board in writing that she was pregnant.³ She stated that the estimated due date was April 28, 1971, and, with the consent of her obstetrician, asked that maternity leave be made effective as to her on April 1, 1971, which would be the end of her eighth month of pregnancy. Leave was granted effective December 18, 1970, pursuant to the terms and conditions of the maternity leave policy,⁴ and her request that April 1, 1971, be the effective date was denied.

Mrs. Cohen requested permission to present her case before the School Board, which she did on November 25, 1970.⁵ The Board denied her request for an extension.⁶ The basis was that even though she was, and is, considered to be an excellent teacher, the School Board had a replacement available, and felt it proper to abide by its regulation.

2. She had not yet attained continuing contract status.

3. This was in accordance with the provision that notice of pregnancy must be given the School Board at least six months prior to the date of the expected birth.

4. *fn. 1, supra*. Such leave is not a dismissal. See Va. Code Ann. 22-217.5 (1969 Repl. Vol.). Mrs. Cohen has the right to be re-employed by the School Board at a time when she determines she is physically fit and the School Board is able to place her.

5. Mrs. Cohen's principal had previously requested that she be allowed to teach until the end of the first semester, January 21, 1971.

6. A similar request had been presented by two teachers at the Board meeting of November 11, 1970, and was also denied.

The unrefuted medical evidence is that there is no medical reason for the Board's regulation. As a matter of fact, pregnant women are more likely to be incapacitated in the early stages of pregnancy than the last four months.⁷ Further, there is no psychological reason for a pregnant teacher to be forced to take a mandatory leave of absence. In short, since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor.

In addition, no tenable administrative reason has been advanced by the defendants in defense of the provision. The reasons given by Dr. Kelly and the members of the School Board for the policy, such as fear of pushing with resulting injury to the fetus, and inability to carry out responsibilities in fire drills, are nugatory, and based on no empirical data whatsoever. Neither has there been a substantial study conducted upon which to base the contention that absences will increase during the latter stages of pregnancy. Basically, the four month requirement set forth in the provision was arbitrarily selected.

Mrs. Cohen seeks by way of relief to be placed in the same status she would have been in had she been allowed to teach until April 1. That includes wages from January, 1971, through March, 1971, and all other rights and benefits accorded teachers in the Chesterfield school system, including, but not limited to, seniority.

In 1905, the Supreme Court held that a New York law fixing maximum hours that an employee could work was violative of the Constitution in that it interfered with the right to contract. *Lochner v. New York*, 198 U.S. 45 (1905).

7. Mrs. Cohen missed approximately ten days during the semester she taught. However, those absences were due to religious holidays and illnesses unrelated to her pregnancy.

However, less than three years later, in *Muller v. Oregon*, 208 U.S. 412 (1908), the Supreme Court restricted the meaning of *Lochner* to men, *Id.* at 418-19, and held that a law restricting working hours for women was reasonable due to the difference between the sexes. See also, *Bosley v. McLaughlin*, 236 U.S. 335 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914). The Court later held, under the same theory, that minimum wage laws for women were valid. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Thus, the Supreme Court had established a principle that legislation could, in certain instances, validly prescribe different treatment for men and women.

In 1948 an equal protection argument was first put forth to the Supreme Court. *Goesaert v. Cleary*, 335 U.S. 464 (1948). The plaintiffs contended that a Michigan statute prohibiting women from being licensed as bartenders, except wives and daughters of male owners, violated the equal protection clause of the Fourteenth Amendment. The Court upheld the statute, stating that under the facts presented it was reasonable. *Id.* at 466. However, Mr. Justice Frankfurter, speaking for the Court, stated that "[t]he Constitution in enjoining equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Id.* Thus, though absolute equality is not required, *Douglas v. California*, 372 U.S. 353, 357 (1963), distinctions which are "irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious,'" cannot be drawn. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 673-74 (1963) (Black, J., dissenting).

The defendants, whose actions constitute state action, have attempted to argue that the instant case is simply a matter of contract between parties. They contend that Mrs. Cohen,

in signing the contract of employment, waived her constitutional rights. This argument has been made and rejected previously by the Court. *Cohen v. Chesterfield County School Board*, Civil Action No. 678-70-R, mem. decis. (E.D. Va., Jan. 19, 1971). Therefore, the question to be answered is what rights, as a public employee, does Mrs. Cohen have. "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute for regulation is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). See also *Keyisbian v. Board of Regents*, 385 U.S. 589 (1967).

The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959); *Morey v. Doud*, 354 U.S. 457 (1957).

The defendants attempt to justify the policy on the ground that the five month rule is well within the lines of other school boards in the State of Virginia. However, similar treatment of a certain class in other school districts cannot be used to show that a certain policy has a rational basis. Rather, the Court must determine whether the classification drawn in the regulation, in light of its purpose, serves any rational purpose. Otherwise, it is arbitrary or invidiously discriminating. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Hence, the maternity leave policy in question is discriminatory within the proscription of the equal protection clause of the Fourteenth Amendment to the Constitution of the

United States. Mrs. Cohen is entitled, therefore, to be put in the same position she would have been in had she been allowed to teach until April 1, 1971, as she requested. Such relief includes recovery of her salary for the months of January, February and March 1971, seniority to which she is entitled,* and any and all other rights and benefits she would have received had she been teaching during that period.

An appropriate order will enter.

/s/ ROBERT R. MERIHIGE JR.
United States District Judge

Date: May 17, 1971

ORDER

In accordance with the memorandum of the Court this day filed, it is ADJUDGED and ORDERED that:

1. The maternity leave provision of the Chesterfield County School Board does violate the plaintiff's constitutional rights in that it deprives her of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

2. Therefore, the plaintiff shall receive all rights and benefits to which she would have been entitled, including, but not limited to, her full salary for the months of January, February and March, 1971, and seniority credit for the fall semester of the 1970-71 school term.

8. Had Mrs. Cohen been allowed to teach she would have completed the full semester, and is therefore entitled to seniority credit for that period. However, on her own, she sought leave during the spring semester and is therefore not entitled to seniority credit for that semester since the School Board requires completion of a semester in order to attain seniority for the period. Thus, she receives a half year's seniority credit.

3. Further, the plaintiff shall not be deprived of any rights and benefits to which she is entitled at the expiration of her now commenced maternity leave, including, but not limited to, reemployment.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ ROBERT R. MERTIGE JR.
United States District Judge

Date: May 17, 1971

PLAINTIFF'S EXHIBIT 10

[pp. 16-17]

5. MATERNITY PROVISIONS

a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

(1) Maternity leave must be requested in writing at the time of termination of employment.

(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

(3) An individual will be declared eligible for reemployment when she submits written notice from her physician that she is physically fit for full-time employ-

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ment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

(4) Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

(5) All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

(6) The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

PLAINTIFFS EXHIBIT 6

**DR. DAVID C. FORREST
DR. FRANK S. KNIGHT**

**MONUMENT MEDICAL BUILDING
4908 MONUMENT AVENUE
RICHMOND, VIRGINIA 23230**

TO WHOM IT MAY CONCERN:

**Re: Mrs. Leo Cohen
(Susan)**

This is to certify that the above captioned patient is under my professional care for pregnancy. She has my permission to work at her regular job as long as she desires.

If any further information is needed, please feel free to call this office.

Very truly yours,

/s/ David C. Forrest, M.D.

DCF:ikg

PLAINTIFF'S EXHIBIT 7

November 11, 1970

A regular meeting of the Chesterfield County School Board was held this evening at 8 o'clock in the board room of the School Administration Building.

Mrs. Barbara Westerhouse and Mrs. Sherrie Bowman, teachers at the Falling Creek Elementary School, appeared before the board asking that the policy on maternity leave be reconsidered thereby allowing them to remain in their present position beyond the limit as set by the policy. (The resignation date on both teachers had been set at Dec. 18, 1970—they were asking that the date be extended through Jan. 22, 1971).

Mr. Gordon brought the board up to date on these two cases and stated that he felt that the regulation was entirely reasonable. However, he said that if there was a very good reason for extension in terms of benefit to pupils and the good of the system, etc., then he would certainly recommend it. Otherwise, he felt we should adhere to the policy. Mrs. Stoncham, Director of Elementary Personnel, was present and assured the board that qualified teachers were readily available to fill these two positions at the Dec. resignation date. The superintendent also recommended that we stay within the policy.

The chairman then stated that the child was the main concern of the school board, and if the staff could not locate qualified replacements, then the board would certainly want to make an exception and extend the time. On the basis of the information presented, it was the consensus of the board that the policy not be changed on maternity leave. Mr. Crump did add that it might be well to review the policy at the end of this school year, and if it was found necessary, then appropriate changes would be made.

PLAINTIFF'S EXHIBIT 8

11/25/70

Mrs. Susan Cohen, a teacher at the Midlothian High School, appeared before the board requesting an extension of her resignation date from December 18, 1970, to January 22, 1971. According to present board policy on pregnancy, Mrs. Cohen's last date of employment was set at December 18; however, she was asking that she be allowed to finish out the semester in view of the short time involved, her good health to date, and the fact that students and parents wanted her. The board listened intently and sympathized with Mrs. Cohen, but the chairman explained that it was impossible to make a policy that would suit everyone, and if the present policy is not adequate, then the board would surely review it at the end of this school year. The board then, on motion of Mr. Russell, denied Mrs. Cohen's request for extension.

DEPOSITION OF DR. LEO J. DUNN

[TR. PP. 4-12]

Q Dr. Dunn, please state your name and address.

A Leo J. Dunn, Medical College of Virginia, which is 1200 East Broad Street, Richmond, Virginia.

Q Please state your current position.

A Professor and Chairman of Obstetrics and Gynecology for the Medical College of Virginia.

Q Dr. Dunn, what are the different type of illnesses that might occur during the term of pregnancy to a woman that might affect her working capabilities?

A Well, a pregnant woman is not immune to any diseases that a woman of the same age would be subject to, so that she would be subject to any of these diseases. As far

as special disorders in pregnancy there would be a few, and the major ones would be: toxemia pregnancy, anemia and then hemorrhagic condition related to placenta or what is commonly called the after-birth.

Q At what stage of a woman's pregnancy do these problems occur?

A Usually in the last few months.

Q What about such problems as morning sickness?

A Well, we don't usually regard these as illnesses, unless they are extreme. They are considered symptoms of pregnancy. These usually occur, the morning sickness particularly occurs in the first few months of pregnancy.

Q What other symptoms of pregnancy are there that occur?

A Ordinary symptoms of pregnancy, early pregnancy would be the nausea, breast changes with enlargement and engorgement of the breasts, and constipation. These are the three major symptoms that women have in the first part of pregnancy.

Q Do these symptoms usually disappear?

A After the first 12 weeks it is uncommon to have these symptoms. Then later in pregnancy they will ordinarily have some edema or swelling of the legs, which is usually minimal. They will have some backache occasionally, related to the change in their body contour with change in the center of gravity, and that is about the major things.

Q The disease conditions you mentioned, I believe toxemia, anemia and hemorrhagic condition, these are disease conditions such that would require hospitalization?

A Yes.

Q These could be diagnosed by a doctor by examination?

A Yes.

Q Dr. Dunn, are there any medical or physical conditions that are certain to occur in a woman during her last four months in pregnancy that would render her incapable of working in an occupation such as a teacher?

A No, I don't think so.

Q Do you believe that a woman who is undergoing a normal pregnancy and under a doctor's care and supervision should be required by her employer to stop working at the end of her fifth month of pregnancy?

MR. MASON: I object to that question. It calls for a conclusion which goes to the issue of the reasonableness rule, and is the decision that the Court itself has to make.

You may go ahead and answer.

A No, I don't think that this is any reason for them to have to discontinue work of this sort.

Q What do you base that opinion on?

A Well, our policy and our own practice has been not to advise patients to discontinue work.

MR. MASON: I object to the last question for the same reason.

A In that they have had no difficulty in maintaining their work. If they find that the combination of pregnancy and their ordinary work is fatiguing, then they can request a leave. But this is not, we don't find this to be very common.

Q Would you consider the job of a teacher, who teaches classes of 11th and 12th grade children in the same classroom, and on the first floor of a school building, and with a schedule such as a 20 minute homeroom period, three 50-minute classes with 5 minute breaks in between, and then a 50-minute period of free time, and then 40 minute lunch

break, and then two afternoon classes of 50 minutes are particularly strenuous occupation that would require special treatment for a teacher if she was pregnant?

A Well, I wouldn't think so, from what you described. You described a very ordinary work day, and I would say that most pregnant women would be able to handle that pretty well.

Q What would you consider a strenuous occupation that might require a woman to be laid off if she was pregnant?

A Well, the things that we would be concerned about would be mainly those occupations that would expose the person to hazardous conditions; that is, noxious gases or something like that where they would be more clear cut as to whether this might be harmful to the fetus, since these gases might get into the bloodstream. Also I would say that any occupation where it would be necessary for them to have a good sense of balance; where they would be subject to falling and this sort of thing, since they, as they increase in pregnancy they become unbalanced with the change in body contour; then we would be concerned about that. And then long periods of standing still, I would think would be uncomfortable to them, but I don't think it would be hazardous to them, just because of the weight of the fetus and all that.

Q Would the fact that a woman who is teaching, was forced to walk up and down hallways with children in the hallways, would this be considered a hazard to her health because of her problem with equilibrium?

A No, I don't think that would be a hazard.

Q In other words, this would be something in the ordinary term?

A She should be no more subject to any particular prob-

lem than she would be going shopping or walking along the street or something like that.

Q From a psychological standpoint of pregnancy, isn't it better for the pregnant woman to have some sort of employment or occupation during her period of pregnancy?

A I don't think I could say that categorically. I think that is really a very individual thing. I think some people are glad to retire early, and some people aren't. I don't think psychology has a lot to do with it.

Q Do you believe that a pregnant woman who has not had any real problems during her first five months of pregnancy would miss any more time from her work during the latter four months of pregnancy?

A I don't see any reason why they would necessarily have to. Now, of course, these are people who have to have regular doctor visits. This is programmed, that they have to make so many doctor visits. It just depends on how these are scheduled, whether it will interfere with their work.

Q Dr. Dunn, would you consider pregnancy as a special condition that would require such special treatment from a woman's employer? Should pregnancy be treated as any condition that might affect the working capabilities of the woman?

A Barring those things I have mentioned where they would be exposed to hazardous conditions, I think that they should not necessarily require special treatment.

Q What person do you believe is best able to judge at what stage of pregnancy a woman should stop working?

MR. MASON: I object to that question. It calls for a legal conclusion which the Court itself has to make in this case.

Q Would you like for me to repeat the question?

A Yes. The question was who is best able to make the judgment as to when a person must discontinue working?

Q Right.

A I suppose ultimately it is the individual herself who would decide best in terms of her own family needs and whatnot as to when she would discontinue working. Pregnancy, as far as condition of health, I suppose that would be a medical decision.

Q Do you feel that a policy that prevents women from working beyond their fifth month of pregnancy is of benefit to the woman?

MR. MASON: I object to that question for the same reasons as before, it calls for a legal conclusion which the Court itself must decide.

A I wouldn't regard it—You are saying now is it benefit to the woman if it is mandatory—

Q Right.

A —the time of quitting work? I wouldn't think that it is of particular benefit to the individual not to have a choice.

Q What type of policy would you prefer to be in effect?

MR. MASON: I object to that question for the same reasons as stated previously.

A Well, I think that in non-hazardous circumstances that it is better for the patient, and working with her physician, to decide when she should discontinue work. This is really pretty much the policy we follow with our practice. If we find anything as far as we are concerned, the patient ought to have a more sedentary life, then we recommend that they discontinue work. The majority of our patients, though, work right up to the time they go into labor. As an example of that, one of our office personnel in our private practice

went into labor while she was working yesterday and delivered this morning. We follow through on this. And she had no difficulty maintaining her occupation routine during that time.

Q How many patients do you usually see in your private practice?

A Our practice at the Medical College right now, with a full time staff, is about 160 deliveries a year.

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[DEP. PP. 14-15]

A Well now, swelling is not a health problem. It is a physiologic change with pregnancy. The abnormal swelling would be related to the toxemia pregnancy that I mentioned before.

The ordinary diseases of this age group occur by and large with the same frequency with pregnancy as without except perhaps for the occurrence of urinary tract infections which is somewhat increased in pregnancy.

Q Generally when a condition of this type prevails in a pregnant woman, what do you generally prescribe?

A Urinary tract infections?

Q No, swelling.

A If it is normal swelling of pregnancy, that is physiologic swelling. We don't treat that, ordinarily. If it just a physical finding. Because it is anticipated, and it is not pathologic. If it is swelling related to toxemia, and it is also associated with blood pressure rise and changes in the urinary findings, then those patients are hospitalized.

Q They are hospitalized?

A Yes.

Q Can this condition occur in any pregnant patient?

A It is more likely to occur under certain circumstances. There are certain people who are more likely to have toxemia than others.

Q Would it be safe to assume that no pregnant woman is immune from it?

A I think that is safe to say. I think there are categories of pregnant women who would have very low susceptibility, some would have very high susceptibility.

Q Can this occur during any stage of the pregnancy?

A No. Your toxemia pregnancy is, by definition does not occur before 24 weeks of pregnancy, and is uncommon until after 30 weeks of pregnancy and thereafter increases in its incidence as each week goes by.

* * *

[DEP. PP. 17-24]

Q What pre-natal care advice do you generally give your patients?

A Well, we advise them as to diet, we prescribe pre-natal vitamins as supplements to their diets. We usually give them supplements in terms of iron. We advise them to keep up with their ordinary activities and ordinary sexual relations. Those are the majority.

Q Does this advice change in any respect as the pregnancy develops?

A Only in relationship to sexual relations, which are then stopped approximately six weeks prior to their expected date of delivery.

Q Have you ever noticed or observed any emotional behavior changes in pregnant women toward the latter stages of pregnancy?

A No really emotional changes in them. The serious

psychiatric problems related to pregnancy generally occur at one end or the other; that is, the woman who does not want the pregnancy, and when it is recognized may be decompensate at that point; or what is called post partum psychosis. That is a psychotic reaction that will occur in certain women after they have delivered. That is the ascribed syndrome.

Q Do women have a tendency to become anxious towards the latter months of pregnancy?

A Well, anxious is a general term. I think the major thing that we see is that they get very bored with the process and are very anxious to have it over with. They look forward to delivery. But as far as anxiousness related to agitation or something on that order, I wouldn't say so.

Q Is it your testimony that they are or may be pre-occupied with the pregnancy in the latter stages in relationship to anxiety?

A I wouldn't say so, no. I have not known, I can't think of any patients who have not been able to continue under any ordinary function this way. They generally feel, towards the end of the pregnancy, that nine months is a long time and they would like to go ahead and get it over with.

Q Generally how do you schedule your appointments with your patients?

A The average patient who is normal will be seen monthly throughout most of her pregnancy.

Q Generally once a month?

A Once a month. And then in the 8th month of pregnancy we see her every two weeks, and then for the last month of pregnancy we see her once a week.

Q Would it be safe to assume then if your patient was a working patient that she might have to lose an additional

day's time because of frequency of visits that you would expect?

A That depends on where she works, of course, and what her hours are. If she had to leave work to come for office visits—

Q I am only asking if it is possible.

A Yes, sir, I can see where it would be possible. I could see where they could work it out.

Q Is pregnancy a sickness or an injury?

A No.

Q Could you give a medical definition of what pregnancy is in physical relationship?

A It is a normal biological function. It should not really be regarded as an illness anymore than menstrual periods should be regarded as an illness or any bodily function should be considered as an illness. An illness is when bodily function is deranged, there is malfunction of symptoms and pregnancy is, of course, a normal biologic phenomena.

Q Is it possible that you would ever recommend to a patient that she should not drive an automobile?

A Related to her pregnancy per se?

Q Yes.

A About the only time I can think of in recommending that a patient not drive in pregnancy is if they are on medication that would interfere with their reflexes or ability to handle a car.

Q Sometimes they do take such medications?

A In early pregnancy they do. This would be particularly the anti-nausea pills.

Q Is it safe for a pregnant teacher in the latter stages

of her pregnancy to operate a motor vehicle for long distances?

A Yes, she can.

Q Without any harmful effects to herself?

A We are talking about someone not having an accident, just driving an automobile, then that should be of no particular hazard to her. Talking about automobile accident, that is another story.

Q Do you recommend that your patients avoid stairs or stay away from stairs?

A I don't advise them to avoid stairs, no, in pregnancy.

Q Is there any condition under which you would advise a teacher not to avoid stairs?

A You mean to avoid stairs?

Q Climb stairs.

A Let me think. No. I can't think of any times that I have recommended that.

Q Is there any situation in which you would recommend to a pregnant woman or patient that she not stand for long periods of time on her feet?

A Yes. If a patient has thrombophlebitis or clotting in their veins, then, whether she is pregnant or not, we advise that they don't either sit or stand still for long periods of time. And this is, as I say, true of non-pregnant as well as pregnant patients because they can, during that period of stasis, develop clots in their legs.

Q Do all of your patients have the same coordination?

A Coordination? We don't test for coordination, but I would assume that they have a range of coordination, but we don't test for coordination.

Q Is it possible then that some of your patients have better coordination than other patients?

A I would think they would have the same range of coordination as any other group of people. I can't answer that specifically because we don't test for it. But by coordination I assume you mean equilibrium?

Q And dexterity.

A And dexterity. I can't say that our patients are really different from any other group of people non-selected in any way that I know of.

Q It is quite possible, though, you could have some who are rather adept to good coordination and some who are not so adept to good coordination, is that possible?

A It's possible.

Q Would you ever recommend to any of your patients that they stay clear, as much as possible, from any emergency situations?

A Maybe, if you could tell me what you mean by emergency situations; I think that covers so much.

Q Well, let's say that the pregnant teacher, not teacher, patient has a child who becomes injured out on the lawn someplace seriously; would this be a bad situation for the pregnant patient?

A You are talking about her emotional reaction to this, I gather?

Q Emotional and physical.

A About the only time that the pregnant woman may in an emergency, if you want to use a very general term situation, may affect her is if her own status is endangered. This has more of an effect upon a pregnant woman than say witnessing something that is an emergency situation. If her

own well-being is in jeopardy, this is more from an organic disease than just an emotional impact, although some people feel that an emotional threat to an individual can affect the pregnancy. This is in that area that is very hard to get concrete information on. But those cases, let's say, of women who are felt to have lost a pregnancy, aborted, or gone into premature labor in a crisis, it has been their own situation that has been threatened rather than someone else, helping somebody else.

Q Would the pregnant woman's responses to an emergency situation be better or worse by reason of the pregnant condition?

A I know of no information related to that. I can't really say.

Q Can a woman not pregnant run as fast as when she might be pregnant in her 9th month?

A We have never taken them out on a track, but I would suspect an unpregnant woman would outrun a pregnant woman, depending on the stage of pregnancy, of course. I would think that her physical ability to run distances or rapidly would be impaired by her pregnancy.

Q In other words, this would greatly diminish her ability to perform.

A As far as speed running is concerned, or distance, probably would impair that.

* * *

Q Assuming that your son was being taught by a teacher and she was still teaching at the beginning of her 9th month of pregnancy and a fire occurred at the school, do you think the teacher who has the responsibility of getting the children out of that burning school could act as well in a pregnant condition as in a non-pregnant condition?

A If she had to physically climb out windows or had to carry students or something like that, or carry equipment, she might have more difficulty getting around.

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[DEP. PP. 27-29]

Q When a woman comes into your office who is pregnant and asks for treatment during her pregnancy, the doctor will do a complete medical history?

A Yes.

Q And in this medical history you will find out her occupation, is that true?

A Yes.

Q Based on this information, plus I assume a complete physical is done on the woman, based on this information do you feel that the doctor is qualified to judge whether she should continue working at her present occupation?

A Yes. I would include in that the laboratory studies that are done on her early pregnancy as well.

Q Furthermore, is a woman instructed to inform her doctor if any changes happen to her that might affect the pregnancy?

A Yes.

Q Suppose a woman calls a doctor and tells him that something has happened. What steps does the doctor take then?

A Well, of course it would obviously depend upon what she reports on the telephone. Now, if she is talking about symptoms that she is experiencing that the doctor recognizes as normal changes in pregnancy, then he would reassure her as to the fact that this is normal and further instruct her as to what to expect in the future from that.

If it sounds like she has developed some sort of disease stage, that something is not normal, that is not physiologic, then he would arrange to see the patient for an examination.

Q Doctor, would the fact that emergency situations are apt to occur in any occupation be justification for not permitting a woman to work in an occupation such as a teacher?

A Well, again I would say this would depend upon what the occupation would be. If the situation in pregnancy where a person had to, you know, absolutely get through a certain space in a period of time, talking about a situation where mechanically the enlarging abdomen would not make it possible for this person to actually do this and that it would obstruct her ability to get out of a space or something like this, I would think that would be a real hazard.

Q Have you ever come in contact with any such cases where this has occurred during your practice as an obstetrician and gynecologist?

A No, I really haven't.

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**DISCOVERY DEPOSITIONS OF C. DOUGLAS SPENCER,
ET AL.**

C. DOUGLAS SPENCER,

[DEP. PP. 3-7]

called on behalf of the plaintiff, first being duly sworn,
deposes and states as follows:

DIRECT EXAMINATION

By MR. MANN:

Q Mr. Spencer, please state your address.

A 4126 Beulah Road.

Q Are you a member of the Chesterfield School Board?

A That's right.

Q How long have you been a member?

A About fourteen years.

Q What is your educational background?

A The 9th grade in High School, formal education.

Q What do you do for a living?

A Printing business.

Q How long have you done this?

A 34 years.

Q Mr. Spencer, do you have any other qualifications to be on the School Board?

A What qualifications are you supposed to have?

Q I am asking you. Are you familiar with the case of Mrs. Susan Cohen?

A Fairly.

Q Do you remember when she appeared before the School Board?

A Yes, sir.

Q What was the action the School Board took on her case?

A They denied her.

Q What knowledge or information did you rely on to deny her an extension?

A The information that she gave and the recommendation of the Superintendent and we also have a policy mainly that we try to follow from year to year.

Q Did you rely on any medical knowledge or medical information?

A We had some medical information from her doctor, a letter that said she could work.

Q Could continue working?

A Uh huh.

Q Did you rely on any surveys concerning teachers in the system?

A They have surveys and we rely on the superintendent to give us that information when we set the policy at four months. They told us surveys indicated they had more absences from that date on so that is one reason the policy was set for four months.

Q Why did you pick four months?

A Well, we do not pick it. The teachers and the Superintendent and the policy committee picked it. The School Board does not pick this. That is done by the teachers on a yearly basis. If it is any changes to be made in the policy teachers and a committee get together and come to the Board with these changes in the policy, that they recommend. We do not improve them to disapprove them.

Q You approved the four months period?

A Yes, sir.

Q What were the reasons for approving it?

A The recommendation of the Superintendent and the committee.

Q Did you or any other member of the Board have any independent knowledge outside the recommendations of the Superintendent on which you relied on when you formulated the four months policy?

A Any outside?

Q Outside knowledge.

A We paid a fellow, a Mr. Hislip to make a survey. He earned his graduate degree from the University of Virginia, writing up a policy manual for us which took approximately a year, nine months to a year. He gathered information from the whole eastern coast and mid-west. I don't know how far he went to get his information to write up the policy manual. That is not just a local policy manual. It is from what the other systems do in other areas. We took the best of all of it.

Q Mr. Spencer, are you married?

A Yes, sir.

Q How many children do you have?

A One.

Q How old is he?

A 27.

Q Does your wife work now or did she used to work?

A No, she did work at one time.

Q Did she work at the time when you had your son?

A No.

Q Mr. Spencer, suppose Chesterfield County had a policy that stated a teacher would have to leave teaching at a, five or six or seven-months, would you have any objection to that?

A Well, I don't think anything would be necessary--- I don't think it would be necessary for them to leave at five or six months. I think four months is reasonable.

Q How about a policy that left it up to the discretion of the principal and the teacher and to her doctor?

A I would not be in favor of that.

Q Why not?

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A Because I think it is the Superintendent's position to recommend to the Board these policies.

Q Then you consider the Superintendent more qualified than a doctor?

A No, but the doctor can only say one. We are dealing with group. We are not dealing with one person. We are dealing with groups.

Q But you are dealing with each teacher individually as she comes before the School Board?

A If she comes before the Board. We only had three this year.

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[DEP. P. 9]

CLARENCE E. CURTIS, JR.,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

BY MR. HIRSCHKOP:

Q Mr. Curtis, state your name, please.

A Clarence E. Curtis, Jr.

Q Your home address?

A 12624 Petersburg Street, Chester, Virginia.

Q Are you a member of the School Board?

A Yes, I am.

Q How long have you been on the School Board?

A I was appointed to the Board in July, 1970.

* * *

[DEP. PP. 12-21]

Q So she can teach five months into the pregnancy.

Do you know what the rationale is for the time limit of five months?

A I do not quite understand your question.

Q Why five months as opposed to six months?

A I think this is our policy.

Q What is the basis of the policy aside from having the policy?

A It was recommended to us by our Superintendent of Schools.

Q Were you around when the policy was initiated?

A No, sir.

Q Do you know how it came to be?

A Not exactly, no, sir.

Q Do you know if it was witnesses or anything before the School Board?

A No, sir.

Q You assume it was recommended by the Superintendent of Schools?

A (Nodding head in affirmative).

Q Let's go back to the first question. Aside from the recommendation of the Superintendent or whoever made it, do you know of any reason why it would be five months as opposed to six months?

A I would not be familiar with that, no, sir.

Q If the superintendent then recommends six months, would that satisfy you?

A I think he would give thorough study to it and he would have just reasons if this is his recommendation.

Q Then if he came to you and said seven or eight

months, and again you have the assumption he gave it thorough study, would that satisfy you?

A I am not real sure.

Q Why not?

A I think they had a reason for not allowing any longer than four months.

Q I understand that. I don't mean to pick at you on this but in your mind I wonder if you know of any thing or can think of any reason because you are a voting member of the School Board, why you would object to a teacher teaching six months into the pregnancy aside from the policy?

A I think the condition of the individual would definitely have an effect on the school system.

Q How?

A I think the appearance for one thing.

Q Don't you think that high school children should see pregnant women?

A Definitely but I think it would affect the work she could do in the school system.

Q How would her work be affected?

A I think you would have to consider the state and welfare of the teacher to some extent.

Q Would she be more safe or less safe?

A I think she would be less safe.

Q Why?

A I think that is known. I am not a medical man either, so I don't know the real reason.

Q I would like to know if there is any rational basis. Is it just a feeling you have or a reaction, or do you have some basis for that feeling?

A I think, we are concerned with giving the children the best education we possibly know how. I do believe this condition would affect the educational program of our county.

Q I do not question your motives one bit. I am trying to determine how would it affect the educational program? You gave me a general statement.

A I think absenteeism increases in the last few months. This affects the educational program.

Q You say the last few months. You mean after the fifth month?

A Right.

Q What do you base that belief upon?

A From the recommendation that they set this policy by. I was not here at the time.

Q I want to know what you know. Do you know of any facts from which you could draw an inference?

A I am not that familiar with it.

Q So that you think that absenteeism would increase but you have no knowledge of any facts which would make you have a rational belief of that?

Aside from a belief that absenteeism would increase do you have any other reason why you would be opposed to a change of policy?

A No.

Q That is the only reason?

A I have stated earlier that I think it affects the educational standards of the school or program.

Q Is that because of potential absenteeism or something else?

A The absenteeism has a lot to do with it.

Q Is there anything aside from the absenteeism that would cause you to feel you should not alter this policy for a woman should not teach until her eighth month?

A Other than that I said earlier.

* * *

Q Have you consulted any studies or statistics informing your opinion on this maternity provision?

A No, I have not.

Q Do you know of any statistics or surveys or studies?

A No, I do not.

* * *

Q I was asking before about the reasons you have for substantiating or believing in this policy. You gave me absenteeism. In light of these past few years are there any other reason you can think of for supporting such a policy?

A I have said it several times, but I think the welfare and the safety of the teacher should be considered along with the educational program of our county.

Q Do you think it is unsafe for a woman in her sixth or seventh month of pregnancy to be teaching?

A I do not think it is as safe as it should be.

Q What standard do you have? Again is that just a reaction?

A It is my personal feeling.

Q Based upon what knowledge or studies is that feeling.

A No study.

Q Just a feeling?

A Right, observation.

Q Aside from the safety of the teacher—Which observations?

A Concerning my own wife with the first pregnancy. The reason she stopped work.

Q The second pregnancy?

A The same thing, and the third one.

Q So you are basing part of your determination on this policy and the fact your wife was pregnant?

A (Nodding head in affirmative).

Q Did you wife cease to do her functions at home in the fourth month, cease to clean the house or cook?

A No.

Q I would rather not get into your personal life. I don't think it is necessary.

In regard to Mrs. Cohen, was it ever brought to your attention her doctor recommended there was no reason she should stop work?

A No.

Q Would something like that affect your judgment?

A I don't think so.

Q Assume that medical evidence determined there was no reason that a woman in her sixth, seventh or eighth month could not teach the same as in her second, third and fourth month. Would that affect your judgment?

A That I am not familiar with.

Q I am asking you to make an assumption. You have made an assumption to the contrary. Let us assume your assumption proves wrong. Let us say abundant medical evidence showed to you that a woman could teach just as well, just as safely, just as dependably in her sixth, seventh, and eighth month as the prior months? Would that change your opinion as to the propriety of this regulation?

A Again, perhaps the entire Board would consider the policy.

Q I am asking how you would feel, not the Board.

A I could not answer that right now.

Q Were you familiar with any recommendations by Mrs. Cohen's principal in this matter?

A Yes.

Q You mean of the fact he recommended she be allowed to remain until the end of the semester?

A This letter came before the Board on the same date her letter came, I believe.

Q In voting on the superintendent's recommendation, were you principally relying upon his recommendation?

A The Superintendent?

Q Yes.

A Yes, sir.

Q That is really what happens in Board affairs of this nature?

A I relied upon his recommendation.

* * *

JOHN W. RUSSELL,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By MR. HIRSCHKOP:

Q State your name and home address.

A John W. Russell, Midlothian, Virginia.

Q Where is your office located?

A Travelers Building, Richmond, Virginia.

Q Are you an attorney?

A That is right.

Q You are on the School Board here?

A That is right.

Q How long have you been on the School Board?

A Since 1959.

* * *

[DEP. PP. 25-48]

Q Do you know what the rationale is for having leave after five months of pregnancy?

A The rationale regardless of the month has to do with the number of days she is apt to be absent. It has to do with the possibility of an accident taking place in school.

Q What kind of an accident?

A Well, you have in your schools any number of people, and it is not as simple as it used to be. You have great numbers of pupils in school, pushing. It is taking place now. It does present a problem.

Q Is it your testimony there is more pushing in the Chesterfield Schools now than ten years ago?

A Certainly.

Q Why is there more pushing?

A You would have to go into something beyond me. I have my own opinion. I could spend the rest of the day discussing that type of thing. Is it a change in people and the times, et cetera, basically this is what it is.

Q Do you think it has anything to do with integration?

A No more than anything else.

Q Is it your opinion that that is because students are pushing each other more—

A Right.

Q That a teacher would be more apt to have an accident when pregnant?

A I would say very definitely. She is more or less off her equilibrium and her ability to stand and control herself then than when she is in a more normal or nonpregnant position?

Q If a number of reputable doctors would disagree in that opinion would that affect your judgment at all?

A Not with respect to the pushing, et cetera. I don't think a doctor would do that.

Q How about with respect to a woman's equilibrium?

A I don't believe he would do it.

Q This just seems to be fairly much of a medical judgment?

A Not on the pushing. I go into schools and visit schools right often. I am familiar. I have been pushed myself. I am familiar with this.

Q When was the last time a student pushed you?

A I would say probably two weeks ago when I was visiting a school. It is not an intentional thing. It is accidental. Students go to classes and you have great numbers. They do not intend it and do not mean it normally. Sometimes they do perhaps.

Q I want to understand this. One of the reasons you have for substantiating this policy is—

A This was not the basic reason. You asked me—

Q I want to know all your answers.

A My basis reason is the question of the fact a teacher after she does become pregnant, the chances the days she

misses from school as time goes on will become greater, the closer she gets into pregnancy.

Q What do you based that judgment on?

A On our own experience.

Q Whose own experience?

A My own experience of course as a parent also. I have had my own children. In addition to that I base it on consulting with other people who likewise have been pregnant. I talked with my wife.

Q How many months did your wife teach after she became pregnant?

A My wife is not a teacher.

Q How many months did she work?

A Not other than in the sense she is a housewife.

Q How do you know she would have—

A I know what time she was required to go to bed and stay in bed, and also she was in the hospital several times. This does happen.

Q Are you familiar with the fact a woman is much more apt to miss time in the first three months?

A I am familiar with that. It is not necessarily true. We discovered in the beginning we might have a rule that no one in that condition—I can't say. I don't know.

Q You can't say? You don't know? You do concede from your experience the first three months are more difficult than the latter six months?

A I did not say that.

Q And compare the first three months to the last six months of pregnancy.

A This I cannot say. It may well be.

Q You are drawing on your own experience from all these pregnant people that you talked to? Didn't they tell you about that?

A I am sure they talked about it. We never discussed which was more than the other.

Q What pregnant teachers have you talked to about their ability to teach in the last four months of the pregnancy?

A You mean recently?

Q Yes.

A I have not talked to anyone. This is the first problem we have had.

The first one we ever had to come before us.

Q Do you know of any studies to substantiate your conclusion a woman would be inclined to miss more time in the last four months?

A Only with respect to our studies we made.

Q Mr. Hislip's?

A No, I said also I have our discussions with teachers every so often with respect to this.

Q No formal surveys?

A No, no indeed.

Q Have you ever thought it would be a good idea to have a study made to see if there is any relevant basis for this policy?

A Should we? It is a possibility, yes.

Q Until now you have not bothered, have you?

A The question has not arisen. We do not usually until the question arises.

Q With regard to other reasons, aside from the propensity to miss time, you stated a teacher would not be safe.

A I said it is more apt to be danger during that period of time.

Q Aside from your own experiences, do you have any factual basis for that belief?

A If you mean studies, the answer is no.

Q Has any doctor ever told you that?

A What?

Q Well, that a woman would be less safe, not as much safety if a woman taught after the fifth month?

A Not directly. In a general discussion. I have never taken it up with a survey. In general discussion I am sure it has happened many times.

Q Aside from the students pushing each other in the hallway what else would tend to make it unsafe after the fifth month?

A Beyond that point you would have to ask the doctor. I cannot answer that.

Q I want to know what you believe.

A I cannot answer.

Q The only thing you would have then which makes it objectionable would be the pushing?

A Of my knowledge, that is correct.

Q Are there any other reasons you know of or believe to substantiate this policy other than the two you have given?

A As far as I know there are none.

* * *

C. C. WELLS,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By Mr. HIRSCHKOP:

Q Mr. Wells, what is your address?

A Matoaca, Virginia.

Q How old are you, Mr. Wells?

A Subtract 1892.

Q Would 79 be a reasonable figure?

A I was born in 1892. I am 78.

Q Mr. Wells, how long have you lived in Chesterfield County?

A My entire life.

Q How long have you been on the School Board?

A I say approximately 18 years.

* * *

A No, no special training.

Q Mr. Wells, do you know anything about the maternity policy of the School Board for pregnant teachers?

A Yes, we do not have a set standard. It is usually through the recommendations of the Superintendent.

Q Mr. Wells, you must know about everybody in this county by now.

A I know lots of people.

Q Do you know any reason why a pregnant woman should not be allowed to teach?

A Well, I don't know any reason why they should not be allowed to teach up to a certain standard.

Q A certain time?

A A certain time, yes.

Q What time is that?

A I would say when they became very conspicuous, and

they could not give more time to teaching. They had to give it to the maternity cause.

Q What do you mean by conspicuous, when the belly starts to show?

A Yes, because some of the kids say, my teacher swallowed a water melon, things like that. That is not good for the school system.

Q Don't you think high school students should know about those kinds of things?

A Yes, I think high school students should know.

Q What reason would you have for such a policy in high school teaching?

A Well, the policy in the high school, we do not have any policy other than when we think the teacher cannot give full time to her classroom work because if it is a maternity case she has to give more time to her health and her environment.

Q Don't you know, Mr. Wells, lots of women work in other jobs through the seventh and eighth month of pregnancy?

A Yes, I think so.

Q They work okay, don't they?

A So far as I know.

Q Why could not a teacher do that?

A Well, I really don't know. I can't answer that question because I don't know how the teacher is affected in her health. I don't know whether she has got to give more time to her maternity reasons and to her home and environment, medical care, things like that.

Q In supporting this policy you really just took the recommendation of the Superintendent, ain't that right?

A We have not had very many cases to come before the Board.

Q Yet you have a set policy written down?

A That is usually worked through the Superintendent, and his recommendation comes to the Board.

Q But the reason which support the policy as far as you know, you just rely on the Superintendent's recommendation?

A That is right. As far as I am concerned the teacher can teach on until she enters the hospital.

Q If the Superintendent recommended that that would be okay with you?

A That is right. After all the Superintendent runs the schools.

* * *

G. L. CRUMP,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION

By Mr. MANN:

Q Mr. Crump, please state your address.

A Mosely, Virginia.

Q Are you a member of the School Board?

A Yes, I am.

Q The Chairman?

A Yes.

Q How long have you been on the School Board?

A I think I went on there in 1951.

* * *

Q Were you a member of the Board when the policy was first promulgated?

A Yes.

Q What was the rationale in adopting this policy?

A Well, the policy was adopted on the recommendation of the consultant we had, that had worked with teachers and staff and the School Board.

Q Was any medical testimony presented to the School Board when this policy was adopted?

A Not to the School Board, not to my knowledge.

Q You adopted it on the recommendation of Mr. Hislip.

A He worked with us, yes, sir, as a consultant.

Q Do you feel this policy is a reasonable one?

A I do, yes.

Q What is your reason?

A Well, we have to take into consideration first the child and then the teacher. We feel that for the benefit of the child this is a good time to stop. We feel also for the benefit of the teacher since at four months, it is necessary for her to climb stairs, it would be necessary for her to be in halls at rush time with school children, this type of things. We feel for the safety of the teacher this would be a good time.

Q What do you mean by for the benefit of the child?

A Well, basically we feel that in the school set up that pregnancy presents some uncomfortable position for the teacher and I think because of that could overflow to the student.

Q What do you mean by an uncomfortable position?

A Because of the size and the growth in the stomach of the child.

Q On what did you base this opinion?

A Just a personal opinion.

Q Have you ever consulted any doctors on this?

A No.

* * *

[DEP. PP. 40-41]

Q Suppose the School Board enacted a policy whereby a teacher was allowed to teach through her seventh month, would you consider this reasonable?

A I don't think I would agree with it.

Q How about three months?

A Well, I think we have arrived at what we feel is a very justifiable policy. I don't think I would change it.

Q What do you mean by a justifiable policy?

A As far as the dates are concerned?

Q Why not four months?

A Four months is what we have.

Q Why not six months then?

A I am a parent. I am somewhat familiar with this. I have two children. I think from what my wife went through I would say four months is a good time.

Q Did your wife work before?

A No, she did not.

Q She was just a housewife?

A That is right.

* * *

[DEP. P. 47]

ROBERT F. KELLY,

called on behalf of the plaintiff, first being duly sworn, deposes and states as follows:

* * *

[DEP. PP. 49-50]

Q Have you ever dealt with such a policy before, maternity leave policy?

A I have not.

Q Have you ever had reason to explore as an administrator whether such a policy was rational or what perimeters there should be in the policy?

A I have not.

Q Did you have any empirical data when you took over to substantiate four months before pregnancy was a proper time for a woman to leave employment?

A I did not.

Q Referring to the time that Mrs. Susan Cohen left the school, at that time had you gotten any empirical data?

A Empirical, no. We had some general surveys that were not done for Mrs. Cohen; for general information as to the number of months at which we felt the teachers had an inordinate days absent.

* * *

[DEP. P. 53]

Q Did you recall on November 11 you recommended a Mrs. Barbara Westerhouse and Sherry Bowman not be extended?

A That is correct.

Q What were the reasons for not extending them?

A We had teachers who could replace them immediately.

Q With regard to the policy itself other than replacement question do you see any other reason why you would extend this policy?

A Say that again, please.

Q Do you know of any circumstance other than replacement question involved when you would otherwise make an exception to the policy?

A Upon a very strong recommendation of the principal.

* * *

[DEP. P. 57]

Q Do you know if the number of days out in the first five months would tend to be much higher than the number of days out in the later four months?

A No, I do not have any information to say that.

Q Are you married?

A I am.

Q A father?

A No.

Q You do not know about pregnancy on a person on first-hand basis, do you?

A No.

Q You don't know much about the woman's physiological condition at any given month during her pregnancy?

A No.

Q You have no medical knowledge of this?

A I do not.

Q You have had no doctors give you any medical information?

A I do not.

* * *

[DEP. PP. 60-66]

Q Would four months be better than five months?

A I don't have an answer for that.

Q Would six months be better than four?

A I don't know.

Q Would seven months be better than four?

A I still don't know.

Q Eight months better than four?

A I still don't know.

Q How about two months?

A I still don't know.

Q You have no idea which month is best, do you?

A I do not.

Q How did you go about recommending a teacher should leave? Based on the existence of the policy?

A The School Board policy.

Q What is the rationale of this policy?

A The rationale is that at a certain point in a term of pregnancy a women becomes physically dependent upon services of a doctor, becomes physically open to harm by students in pushing.

Q Is there any other rationale? Are they the only two?

A All I can think of.

Q If a man had a sprained ankle, would you put him on some kind of leave?

A We do.

Q For a sprained ankle?

A Not leave, but if he wants to stay out he is given sick leave.

Q If he wants that. You force him to stay out?

A No, we do not force him.

Q Let's be plain about this. If a man came with his ankle in a cast you would let him teach Biology?

A That is correct.

App. 61

Q He would be subject to pushing? He would be less stable than a pregnant woman, perhaps, wouldn't he?

A I don't know if I can answer that question.

Q All right. Have you ever heard of morning sickness?

A I have.

Q You understand it is something referring to pregnancy during the early months?

A I do.

Q Would a woman be more stable or less stable in terms of her balance during morning sickness periods?

A Not being a medical doctor I don't think I can answer.

Q How does pushing affect a pregnant woman?

A I think just the extension of the stomach due to pregnancy and the possibility of hurting the child and the mother and the intended mother.

Q Which child? The one inside or the one outside?

A The one inside.

Q How is it going to get hurt?

A I think it could be physical damage to the child.

Q If a doctor said that is really not the case, and it is really no danger to the child, would that affect your judgment?

A If a doctor said so?

Q Yes.

A I might ask for other doctors to give me competent answers.

Q Don't you trust any given doctor?

A I think they are opinions just as they are with many subjects.

Q About certain educators, about certain male chauvinistic viewpoints of pregnancy?

A Possibly.

Q Would you characterize it as a male chauvinistic viewpoint of pregnancy?

A' I would not.

Q Do you hold any prejudice towards women?

A I do not.

Q Do you think women should have equal employment opportunities?

A I do. They are granted that in Chesterfield.

Q What are the sick leave policies with regard to various ailments of men?

A They are granted one day per month sick leave, ten months per year.

Q What about mandatory leave?

They must leave with certain illnesses?

A I believe. I don't believe we have any at this point.

Q You don't? How about ~~post~~operative care? Do you make a teacher take a certain amount of leave after an operation?

A Depending upon the doctor, to give us an indication when the person should return to work.

Q Isn't it a fact when a teacher has an operation he comes to work and you accept the fact he says he can work? You don't make them bring a doctor's excuse, do you?

A I don't think there is a regulation that I would suspect the principals probably would ask.

Q Let us talk without your knowledge. Have you ever made a teacher bring in a medical excuse to allow him back in the school, a male teacher?

A I have not.

Q Would you ever do that as a professional?

A Yes, I would.

Q Under what circumstances?

A Under the circumstances of a person who was committed to a—

Q Mental institution?

A Yes.

Q And had a communicable disease?

A Yes, sir.

Q How about a broken leg? Where a man had an operation?

A No, I do not.

Q Gallstones removed?

A I do not believe we probably would do that.

Q How about if a woman had a D. and C? Do you know what that is?

A I do not.

Q How about if a woman's tubes were tied? Do you know what that is?

A I do?

Q Would you make her bring in a medical certificate to come back or would you accept her judgment that the doctor said she is well enough to teach?

A I would accept her judgment.

Q Why won't you accept the similar type judgment in pregnancy situations?

A I personally think the similarities are not the same.

Q Do you have any medical knowledge of the similarities?

A I do not.

Q Let's go back to the pushing. In all the time you have been in the schools, how many babies have been lost in school after a woman got pushed in the stomach?

A I know of no cases.

Q Have you ever heard of any cases?

A Not personally at this point. I cannot say that I have.

Q What makes you think it is dangerous for a pregnant woman because of pushing?

A I have no medical knowledge of it.

Q Is all this pushing taking place in the hall or in the classroom?

A I think at any given place, both.

Q How many have you seen pushed in the stomach in the classroom, pregnant or not pregnant?

A If not pregnant, she does not stick out as much as a pregnant woman. I have not seen any.

Q How many inches does a pregnant woman stick out?

A Beyond her normal waist line.

Q That is reasonable. Aside from sticking out where is her sticking out getting her pushed? In the hallway?

A I am saying for the protection of the mother I feel that the possibility that the pregnant woman could be pushed, forcing her against the wall, forcing her against another student, and for that reason I think possibly she could be hurt and the child could be hurt.

* * *

[DEP. P. 69]

Q You have no idea what the absentees were for, do you?

A No, except they were not in school.

* * *

[DEP. PP. 72-74]

Q I want to wrap this up. I have asked what the main reasons were. You said two. One was the dependency of the woman in performing her functions, right, and the question of absenteeism?

A Yes.

Q And two was the safety of the woman.

A That is right.

Q These are the reasons you have for the policy?

A That is right. Well, let me clarify that. They are my interpretations of the policy. The policy was written before I arrived.

* * *

Q You have no data upon which to reasonably conclude the sixth, seventh or eighth month would be high absentee months, do you?

A No, I do not.

* * *

**SUPPLEMENTAL DESIGNATION OF JOINT APPENDIX
EXCERPT OF REPORTER'S TRANSCRIPT
PROCEEDINGS**

[TR. P. 10]

SUSAN COHEN

was called as a witness in her own behalf and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. MANN:

Q Please state your name and address?

A Susan Cohen, 5103 Downy Lane, Richmond.

Q Mrs. Cohen, what was your former occupation?

A School teacher.

Q What school?

A Midlothian.

* * *

[TR. P. 17]

Q Mrs. Cohen, have you experienced any real problems, health problems, during your pregnancy?

A No. None.

Q Please tell the Court what has been your normal routine from the periods since you have left teaching until now?

A Shopping, entertaining, doing a lot of house work, running around with friends.

Q Would you say that this routine has been more fatiguing than your former routine as a school teacher?

A Well, I am doing more physical labor and house work now that I am home all the time, probably than when I was teaching and in school.

* * *

[TR. PP. 27-38]

Q Have you experienced any swelling as a result of the pregnancy during this term?

A Perhaps a slight swelling in my fingers.

Q Anywhere else?

A Not that I can think of.

Q Other than that?

I was thinking specifically of feet or ankles.

A Well, I have been running around the same way I have always run around. I am generally active and I have been able to maintain that activity.

Q Are you maybe getting a little tired sleeping on your back or side?

A No.

Q By reason of pregnancy do you sleep on your belly?

A I sleep half on my belly and half on my side, but I am just as comfortable as I have always been and I sleep the whole night.

Q Have you experienced any backaches of any sort?

A Any real backaches, no.

Q No backaches at all?

A No.

Q Mrs. Cohen, do you think you could run as fast today as you could five months ago?

A Well, I was never particularly good in athletics so I don't know if I could run as quickly today as I could then. Probably not. But I definitely can get around and can move as quickly now, almost as quickly now as I could before.

Q Now, you don't think you could run as fast?

A Well, I never could run quickly.

MR. MASON: That is all. Thank you.

THE COURT: Any redirect?

MR. MANN: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. MANN:

Q Mrs. Cohen, were these sick days you took during the latter part of this year, were they due to illnesses or due to your pregnancy?

A They had nothing to do—totally unrelated to my pregnancy.

Q And Mrs. Cohen, did these sick days exceed the number of days allotted to you under the school board policy?

A No, they did not.

* * *

DR. DAVID C. FORREST

was called as a witness by and on behalf of the plaintiff and, after having been first duly sworn, was examined and testified on his oath as follows:

* * *

Q Dr. Forrest, please state your name and address?

A I am Dr. David C. Forrest. I live at 3908 Exeter Road, Richmond, Virginia, and practice medicine at 4908 Monument Avenue.

Q What is your profession?

A I am an M.D. specializing in obstetrics and gynecology.

THE COURT: Dr. Forrest is qualified as an expert in the field, gentlemen.

MR. MASON: We are willing to acknowledge that.

THE COURT: He is qualified. He has qualified here before and I know from personal experience of one instance that he was the best in the world.

BY MR. MANN:

Q Dr. Forrest, have you ever examined Mrs. Cohen?

A Yes, I have.

Q When did you first see her?

A I think it was in and around the latter part of September. I think the 26th of September, 1970.

Q What physical findings did you make at this time?

A She was found to be early pregnant with the last menstrual period dating from, I think, July 21. She was given an expected date of confinement of April 26, of this year.

Q Dr. Forrest, has there been anything whatsoever to indicate that Mrs. Cohen has not been undergoing anything other than a normal pregnancy?

A No, I think the pregnancy has been essentially uneventful.

Q How often did you see Mrs. Cohen during her pregnancy?

A Either me or my associate, Dr. Knight, saw Mrs. Cohen at regular intervals of a month apart until she reached the seventh month and since the seventh month she has been seen at about every two weeks, until the last month, in which case she is being followed at weekly intervals.

Q And on these subsequent visits did you repeat the physical examination?

A Yes, they have been repeated.

Q Dr. Forrest, what are the different types of symptoms that are associated with pregnancy?

A Well—

Q Do you understand my question?

A Are you asking the initial subjective symptoms of pregnancy?

Q Yes.

A Easy fatigability, occasional morning nausea, breast changes, occasionally they complain of some frequency and urgency of urination.

Q At what stage of a woman's pregnancy do these problems occur?

A Generally, they occur in the first ten to twelve weeks and subside after the first trimester.

* * *

Q Are there any medical or physical changes certain to occur during the last four months of an average pregnancy that might render all or substantially all pregnant women incapable of working in an occupation such as a teacher?

A That is a very broad question. I feel that each pregnancy and each individual, and that includes succeeding pregnancies, have to be treated and managed in accordance with the progress that the pregnancy is making and the progress the pregnancy is making and any concomitant complications that may develop.

Q I see.

Would you consider the job of a teacher teaching high school children a particularly strenuous occupation requiring special treatment?

A No.

Q What would such a strenuous occupation be?

A I think if a girl worked as a riveter or in some hazardous occupation where she was required to do heavy lifting she would be subject to sudden jolts or was placed in a position where she might be in mechanical operations, that this, I would consider as hazardous. And I doubt that the word hazardous is correct. I think it would probably cause her some jeopardy.

Q Dr. Dunn, when a woman—I will get this right in a minute.

Dr. Forrest, when a woman comes to your office to be treated for her pregnancy, that is not the word, but what do you suggest that she do?

A Well, at the time of the initial visit we try to impress

upon her the fact that this is a physiological state and that we hope to care for her in a manner that will bring her to term and delivery in a normal, healthy state and so that she has a normal, healthy baby.

We try to impress upon her certain restrictions. They are minor. They are asked to watch their diet, not to gain too much weight, generally not over ten to fifteen pounds over the normal weight. If a girl is heavy sometimes we encourage them not to gain any weight. She is told to discontinue douches. She is told to watch highly spiced and highly seasoned foods since they do increase the symptoms of heartburn. She is asked to avoid all unusual medications, not to have any x-rays without prior permission. She is told not to take long trips beyond a hundred and twenty-five miles without permission.

Generally, the restrictions are minor. Nothing major.

Q Do you recommend that she continue her normal routine throughout the time of pregnancy?

A Yes. This includes athletics if she is participating in some minor athletics. We try to encourage them to continue their normal daily routine as much as possible.

Q Dr. Forrest, have you ever encountered a case where a female teacher who was pregnant was injured due to some pushing in school halls?

A I can't recall a case.

Q Would pushing present a real threat to a pregnant woman?

A No more than probably being pushed while she was shopping at Willow Lawn or someplace like that. I presume that the implication is, would she be able to handle herself as quickly as she would in a non-pregnant state and during pregnancy and I think that as the pregnancy progresses and

the uterus enlarges and the protuberance of the abdomen becomes more prominent, I think these girls tend to move slower. I think they have certain restrictions in their motion and except for—I don't think it has anything to do with their mental capacity, I think as far as going up and down stairs and riding in an elevator or something of that nature, she would be able to perform very well.

Q Do you feel that a woman would react in an emergency situation less quickly mentally than if she were pregnant than a woman who was not pregnant?

A I don't think so.

Q Dr. Forrest, would you consider that pregnancy is a special condition requiring some special treatment by employers or should the pregnancy be treated as any other condition that might affect the working capabilities of a woman?

MR. MASON: Your Honor, I object to that question because it goes to the heart of the issue that this Court must decide itself.

THE COURT: Well, I think you have to limit it, Mr. Mann, to what you are talking about. Are you talking about the physical welfare of the patient? That is what the doctor is qualified in.

Objection sustained in the form in which the question is asked.

BY MR. MANN:

Q I will try again.

From the standpoint of physical welfare of the patient, would you consider that pregnancy is a special condition requiring special treatment by employers?

THE COURT: Wouldn't it really go to the type of work?

THE WITNESS: Yes, I think that is an individual thing.

That is what I tried to point out, Judge Merhige, is that I think the particular individual and the particular pregnancy of an individual is an individual thing and has to be managed in an individual manner.

BY MR. MANN:

Q This would depend on the type of work she was doing?

A And the type of pregnancy she had.

THE COURT: It would also depend on the type of person, wouldn't it, the individual person?

THE WITNESS: That's right. The past physical history. A past obstetrical history, all of these things would have a bearing on any decision you would make.

I don't think you can give a carte blanche statement.

* * *

CROSS-EXAMINATION

BY MR. MASON:

Q Dr. Forrest, I believe I understand your testimony that you must decide each patient's case on its own merits, is that not correct?

A I think that is correct.

Q I mean you couldn't generalize or make a general statement as to a whole group of people, that is going to apply to each individual, could you, sir?

A That is correct.

* * *

[TR. PP. 40-51]

Q What, may I ask, are some of the common problems associated with pregnancy throughout the term?

A Specifically related to the pregnancy? The pregnant state or the person as an individual?

Q Well, I am talking about the illnesses that are associated directly with the pregnancy during term.

A Well, recognizing the fact that a woman who is pregnant is subject to all of the diseases of the girl who is not pregnant or the woman that is not pregnant, there are certain diseases that may be specifically related to the pregnant state. For example, toxemia of pregnancy which is a third trimester disease, a disease that occurs in the last three months of pregnancy, is an example. They may be a little bit more subject to urinary-tract infection, which is in question.

Q What about nausea, do they experience nausea?

A Yes, I think I mentioned this in my earlier testimony, that that might be an earlier symptom of pregnancy.

THE COURT: Is there a particular time in which one is more subject to be incapacitated during the term? I gather from what you said that was in the early stages rather than the middle.

THE WITNESS: Middle and last.

THE COURT: Can you say that generally?

THE WITNESS: Generally, that is true.

We occasionally see patients who experience, for example, nausea throughout their whole pregnancy, but this is an individual case.

THE COURT: Go ahead. I am sorry, Mr. Mason.

BY MR. MASON:

Q Have you ever had cases involving premature birth?

A Yes.

Q This is quite possible, is it not?

A Early miscarriage, premature birth, these are complications specifically to pregnancy.

Q Could that happen to Mrs. Cohen?

A It can happen to Mrs.—it could have happened to Mrs. Cohen. She is about at the delivery stage, so it couldn't happen at this date.

Q Well, I understand that.

What about discharging water or blood? Does this happen pregnant women?

A It can occur in pregnant women. It also occurs in non-pregnant women.

Q Could it occur in Mrs. Cohen?

A Yes, it could occur. I don't recall that it has occurred.

Q It could occur in any woman possibly, could it not?

A That is correct.

Q I believe we covered that question.

Now, you spoke on direct examination—you spoke about hazardous occupations. Do you recall that?

A Yes, sir.

Q Suppose you had a patient who was a teacher and taught physical education. Would your feelings or thoughts be the same from the standpoint of hazards to pregnant teachers?

A This question comes up from time to time, if I can relate it, to girls, for example, who ride horseback, professional horsemen, to girls who play golf, tennis, and generally we ask them not to push themselves to fatigue, not to over exert themselves, but allow them to continue as long as the pregnancy has not complications and they do very well.

Q Well, specifically about physical ed—

A I am sorry. I did not answer that. A girl who is in physical education, she could proceed, again, with the majority of things that she would carry out since this was her

own occupation, that she had done this previously and her body was trained to do it. I would again just warn her not to do this to fatigue or to maximum exertion and to consider that she was pregnant.

Q Do you think Mrs. Cohen could do push-ups with the same ease in a pregnant state as a non-pregnant state?

A If Mrs. Cohen were doing push-ups before she was pregnant up through a certain state, she could probably continue them.

Q What do you believe that stage might be?

A I have never thought about the question specifically. I would presume that somewhere in the neighborhood of the fifth or sixth month. This is about the time that the girls begin to sleep on their side or their back and stop sleeping on their abdomen; that she would probably desist at that point, primarily more from her own personal feeling that if she were to slip or drop, she would drop on her abdomen. Women have an innate capacity to protect themselves—

Q I understand.

A —when they are pregnant.

Q But do I understand from your testimony that this would be somewhere depending on the individual, between the fourth, fifth and sixth month?

A For push-ups?

THE COURT: That is the question.

THE WITNESS: Yes, sir. Again, it would be an individual thing.

BY MR. MASON:

Q It would be somewhere in that range, would it not?

A Yes.

Q You agree with that?

A This is a personal opinion.

Q I understand.

Does a pregnant teacher particularly in the latter stages undergo any mental changes at all?

A No. No different than the pregnant housewife or the pregnant clerk. No, she doesn't.

Q Is it safe to assume then a pregnant teacher in her eighth or ninth month does not become preoccupied with the child that she is carrying?

A I am sure that she is consciously aware of the physiological state and that with the increased fetal activity that occurs in the last two months of pregnancy if, for no other reason, just the movement of the fetus would make her conscious of it, but whether it causes her any mental changes, I don't think it does.

Q Do you think that she would be able to handle the day-to-day confrontations with the student in the classroom?

A I should think so, if she were trained specifically for this. I see no reason why she shouldn't continue to perform.

THE COURT: Until when? Let me get it straight.

THE WITNESS: I would say until she goes into labor. If I may just compare. If the mother is being a housewife and taking care of children at home, I am sure that she is going to continue to be a housewife and take care of children until she goes into labor and she is trained as a housewife and a mother.

BY MR. MASON:

Q Does the latter of stages change or have any bearing on the temperments of the pregnant woman?

A Here again I feel this is an individual matter.

Q Is it possible that she could be more irritated easier?

A When you ask me this question I think in terms of comparing her with the woman who has nothing to do, beyond the essence of her being anxious or concerned, I don't think it would be any greater than the woman who was working and the one who is not working. I think all pregnant women, I say all pregnant women, that probably is incorrect, I think the majority of pregnant women have in the last couple of weeks, they are concerned about when they are going to deliver. They have got everything ready and they want to know are they prepared at home and so forth, but aside from that I don't think psychological changes that say, all right, it is the eighth month, you are now going to be upset, I can't answer that question.

Q Is it safe to assume then that you can't make this judgment except on a strict individual basis?

A I would agree, yes.

Q Dr. Forrest, are you aware that teachers in the public school system in the State of Virginia are charged with the responsibility of looking after the safety of children in emergency situations?

A Yes, I am.

Q Would you say that schools, like any other kind of building, are subject to fires?

A Yes.

Q Fires can occur in schools.

Would you consider a fire in a school in which a pregnant teacher was teaching hazardous to her?

A Here again, except for the physical enlargement of the abdomen and the fact she couldn't get through a little window that she may have been able to get through before she was that much pregnant, I can't see that she can't go down

the stairs or do what she has to do. Except for this protuberance which might be restricting to her from going through a smaller hole, I mean a small window or area than she would if she were not pregnant.

Q But she has thirty or thirty-five students she has to get out of the school building. Wouldn't that have some bearing?

THE COURT: I thought the rule was to walk and not run, Mr. Mason. Would she be capable of doing any more than a person of the same weight?

THE WITNESS: I don't think so, Judge.

Now, if it came to lifting someone that weighed two hundred pounds, I doubt that she would do this as well if she were not pregnant.

BY MR. MASON:

Q Knowing that teachers are charged with the responsibility of getting their students out of a burning school building, would you prefer to have your kindergarten child's safety looked after by a non-pregnant teacher as opposed to a pregnant teacher?

A I don't think I would consider that. It wouldn't make no difference to me.

THE COURT: Wouldn't make any difference.

THE WITNESS: Wouldn't make any difference.

BY MR. MASON:

Q Is the coordination of a pregnant person in the latter stages of their pregnancy diminished by reason of the pregnancy?

THE COURT: When you say latter stages, are you talking about four months and five months? Tell me what you mean, Mr. Mason, if you have something specific in mind.

You mean the last month or the last two weeks or the last three months or the latter stages under normal conditions are the last three months, if you divide it into thirds, what do you have in mind?

MR. MASON: Well, to emphasize the point, let's say nine months. In the ninth month of pregnancy is her coordination and agility and dexterity diminished in any way or any degree by reason of her pregnancy?

THE WITNESS: I don't think that there is any question that it is. I don't think, for example, that she has difficulty, for example, putting on her shoes or tying her shoes and maybe things like that. Again, purely a physical thing and in other girls, as I say, they have ridden horseback through the eighth month and again they get on a horse and they seem to find no difficulty, but I think they would just from the physical enlargement of the abdomen have some restrictions and that is the way I would like to leave it.

BY MR. MASON:

Q Oh, isn't it true here again you have a situation that you must decide each case on its own particular merits?

A Oh, I would answer that, yes.

Q Now, let me understand, let me see if I understand your testimony correctly in connection of scheduling of appointments. Did I understand you to say that for the first—for the first six months that you schedule your appointments once a month and through the seventh and eighth month, twice a month and through the ninth month, once each week, is that correct?

A Yes.

Q What are your office hours?

A From ten, generally from ten in the morning until I

finish in the evening, which can be as late as five thirty or six o'clock.

Q Generally isn't it true that your patients, if they are working mothers, have to miss some time from work in order to attend these appointments?

A Of course I don't involve myself too much with this, but the girls seem to get in when they are supposed to get in and the receptionist makes the appointments and they come at their convenience. How they make the arrangements I am not familiar with.

Q Well, if they are working and this is Monday through Friday, they are missing a day from work?

A We don't, for example, try to see anyone on a scheduled appointment after four in the afternoon and we have no Saturday hours, so these girls do come throughout the week.

Q And as a result if they are working, they must miss work to do it, is that correct?

A Depends on what hours they work.

Q Well, daytime hours, schooltime hours?

A I don't know what time they get out of school. I mean if they get out of school at one o'clock or two o'clock they would still make a three thirty or three forty-five appointment.

Q Yes, sir.

* * *

[TR. P. 57]

CATHERINE EAST

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

By MR. HIRSCHKOP:

Q Would you state your full name, please?

A Catherine East.

Q Your home address, please?

A 5312 North 32nd Street, Arlington, Virginia.

Q Mrs. East, where are you employed?

A Labor Department.

Q With the United States?

A United States.

Q And at the Labor Department what is your present duty?

A I am executive secretary of the Citizens Advisory Council On the Status of Women.

* * *

[TR. P. 64]

THE COURT: All right. She is qualified.

MR. RUDY: Well—

MR. MASON: May I get some clarification as to what?

THE COURT: Spell out exactly what field.

MR. HIRSCHKOP: Public personnel policies in the field of the status of women in the labor force, Your Honor.

* * *

[TR. PP. 66-79]

THE COURT: Well, she is qualified in relationship to the field of whom generally employs people and I qualify her as an expert and that is it.

MR. MASON: As pertains to public employment and private employment, except for teachers.

THE COURT: Women. No, I am not excluding teachers. You may take your exception.

MR. MASON: We would except to that, Your Honor.

THE COURT: Go ahead.

BY MR. HIRSCHKOP:

Q Now, Mrs. East, what is the purpose of the job related maternity benefit paper of the President's council?

A Well, we would hope to bring some uniformity into an area where there has been none. We found in looking into this that in some situations maternity has been considered as a "normal physiological process." And when it is so considered the effects of that have been to deprive women of certain rights we thought they should have had. In some of the cases it has been considered as a temporary disability, which has seemed to us it was, after studying it.

The council concluded that childbirth and applications of pregnancy are, for all job-related purposes, temporary disability and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, a union, or fraternal society. Any policies or practices of an employer, either written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to include pregnancy or childbirth, including policies or practices relating to leave of absences, restoration of or recall to duty and seniority.

Q Did you draw a distinction between the pregnancy period and the period after child is born?

A Yes. We felt that one of the reasons that has been so much confusion in this area is that pregnancy and/or childbirth and child rearing have been confused. They are two separate functions. Only mothers, only women can bear children, but other people can rear them. And we felt that

many of the maternity leave policies, so called, and many of the requests for them were really related to child rearing rather than child bearing. So we tried to make a distinction. This paper relates only to child bearing and to the complications of pregnancy, our subject did.

Q With relation then to the findings of the President's advisory council, status of women, wasn't there official conclusion that women should not be, as a matter of course, terminated from employment or suspended from employment on a fact of pregnancy at some arbitrary date?

A Definitely. The council felt, just as the doctor testified, that it is a highly individual matter. That women are just as capable of deciding their own physical welfare, pregnant women, as any other group. Employers normally don't tell you how long you have to be off for a hernia or heart attack, so we decided there was no more reason to tell a pregnant woman how long she should be off. It was a medical question for her and the doctor.

Q This thing you have referred to, is this the official report of the President's committee?

A Yes, sir. We publicized this and sent it to the press and to federal agencies.

* * *

BY MR. HIRSCHKOP:

Q Now, I ask you to look at this document.

A Yes, sir.

Q Are you familiar with that document?

A Yes, sir, I am.

Q What is it?

A It is current estimates in the health interview survey by the Public Health Service, for 1968.

Q Right.

Did you consult this document in arriving at your conclusions on maternity benefits and things like that?

A Yes, sir, we did. The council is made up primarily of business women who are pretty hard-headed and they didn't want to make any unreasonable recommendations or any recommendations that were going to deprive women of opportunities for employment. So we were concerned with, you know, the costs of treating this as any other temporary disability. We knew the federal government did. We had that information and how much time used in the federal government as opposed to industry and so on and also consulted with others because that is a nationwide survey and we found that the—

Q Page seven?

A Page seven. That the days used, the disability, the time lost from work or not, that this is the days of restricted activity per year, on page seven. This would include everybody, people working and not working, but it does indicate that pregnancy is a rather minor part of the reasons why people have restricted activity. That is not really anything that is going to add greatly to the cost of health insurance programs or disability insurance programs or sick leave programs.

We found that per hundred women per year, forty-six days—there were forty-six days of restricted activity due to deliveries and disorders of pregnancy.

Now, when you look at the upper respiratory conditions for example, it is one hundred eighty-five days.

For injuries it is one hundred fifty-six days for women and one hundred ninety-two days for men.

Q All right.

I think the Court will take notice.

We are submitting this on page seven, this table. The

Court will be ready to recognize that this is put out by the National Center for Health Statistics, U. S. Government.

THE WITNESS: Yes, sir. Based on the survey of forty-two thousand families, including about one hundred thirty-four thousand individuals.

THE COURT: All right.

BY MR. HIRSCHKOP:

Q I show you two other documents. Would you identify both of them?

A Yes, sir. This is Acute Conditions Incidents and Associated Disability, United States, July 1967 through June, 1968, also by the Public Health Service. It is based on the same survey as the other document.

Q Is it also put out by the National Center of Health Statistics, U. S. Government?

A Yes, sir. That is a part of the Public Health Service.

Q I draw your attention to page nineteen, table ten.

A Yes. This is loss from work for one hundred currently employed persons per year for various conditions.

Now, this particular table doesn't break out pregnancy. It is lumped under all other acute conditions. But there are on the days lost per year, all other acute conditions are 67.1 which would include pregnancy and a lot of others, but it is 107.1.

Q All right.

Would the pregnancy be included within all other acute conditions and would that compare favorably or less than other normal things as injuries, influenza?

A Far less than influenza or injuries.

Q Now, in arriving at your opinions that the status

papers and the opinions that you will render here today, did you also consider these statistics?

A Yes, we did.

Q Would you look at the third document I have given you?

A Yes.

Q What is that document?

A That is especially prepared by the Public Health Service recently. Days Lost From Work Associated with Acute Conditions and Days Lost from Work per hundred per year by sex and condition group, United States, July, 1966 through June, 1967. That is the latest year for which they could have this kind of background that breaks out the pregnancy on the days lost from work.

And they prepared it for me in preparation for this testimony.

Q Okay. Who prepared it?

A The Public Health Service. Mrs. Ethel R. Black, statistical assistant in the analysis and reports branch.

Q Is this more detailed than the other two I have asked you about?

A Yes. It gives more detail on days lost from work. You can see under deliveries and disorders of pregnancy 20.9 days per year per hundred women. This would be one hundred employed women lost from work for this reason; whereas, for fractures, dislocations, sprains and strains it is 45.2 days and for upper respiratory conditions 49.4 days and for influenza 54.5.

* * *

Q Again, in preparing for today and also carrying on everyday duties, did you look into other departments of the

government, United States Government, as to how they did things?

A Yes, I did. The Department of Labor has an agreement with its union which specified that it is up to the women to decide when she will leave.

Q Is this—

A That is it. When she will begin taking leave. When she will be off.

Now, she does have to have a medical certificate if she starts taking leave more than so many days before. I have forgotten the exact number. If she begins leave more than forty-two days before delivery, she has to have a doctor's certificate. And if she continues her absence after the fifty-sixth day, she has to have a doctor's certificate. But within those limits it is entirely up to her.

Q Does the United States Department of Labor under their agreement with their own employees permit an employee who is pregnant to work up until the day of going into labor?

A Oh, yes. That has been common in the federal government for many years, women my age used to have, you know, babies the day after they worked.

Q Now, has the U. S. Department of Labor, Office of Federal Contract Compliance looked into this area?

A Yes. Under executive order 11246 the Office of Federal Contract Compliance is required to investigate complaints of discrimination because of sex in private contractors. And they had to consider this area and did adopt or adopted some guidelines and interpretations.

Q Now, would you take these, going back for a moment to the Labor Department, would you just read into the record what their official policy is rather than clutter the record with that whole document?

A The whole thing?

Q Just the short policy on the ninety days.

A Okay.

"An employee may be absent on leave up to ninety consecutive days for maternity reasons. She may choose how and in what order such absence shall be ordered, sick leave and annual leave or without pay leave to the extent that she has available and annual and sick leave time. She may use all, a part, or none of her available annual or sick leave time. Any absence in excess of available annual and sick leave time will be recorded and treated as without pay. The employee may also choose when these ninety days of absence will begin. On the employee's request and personal certificate absence will be charged to sick leave time to the extent available."

Q Okay. That is fine.

Now, counsel has a copy of this and I am sure you will want to cross-examine.

Did you look into the office of federal contract compliance?

A Yes.

Q Would you tell me what do they do, very briefly?

A Well, there is one question here I think spells out the issues before this Court.

Q Before you read that or read from that, what is the document to which you refer?

A Memorandum to heads of agencies.

Q From?

A John L. Wilkes, Director of office contract compliance, U. S. Department of Labor, dated November 12, 1970, and the subject is questions and answers concerning sex discrimination guidelines.

Q And to the best of your knowledge and according to your research is this now the official policy that is being followed by the office of the federal contract compliance, U. S. Government?

A Yes, sir, it is.

Q What is that policy on this maternity leave?

A This question ten spells out the situation. "May contractor specify the time when maternity leave shall begin?" And the answer, "Not normally. This is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor."

Q Did you look into the policies of the Department of Defense?

A Yes, sir. The Department of Defense employs a large number of school teachers overseas and in the dependency schools, in fact, I think well over six thousand employees totally.

Q In the teaching profession?

A In the school teachers and principals and secretaries and so on.

Q What is the official policy of the U. S. Department of Defense with regard to maternity benefits?

A Well, maternity—there is no specification as to how long a woman has to be off. The leave that a teacher accumulates can be used for this purpose as well as for illness or for personal emergencies and so on.

Q Is there any directive in the Department of Defense as to when their teachers must take leave?

A No, there is not.

Q May they, according to your research, work up until the time of labor in the Department of Defense schools?

A As long as they are performing their duties adequately they could.

Q And did you also look into the requirements of the Department of Health, Education and Welfare with regard to its employees?

A Yes, sir. I called. I didn't have the time to get their official public statement, but I called and talked to the personnel people there and they said that they had laid down no rules, no blanket rules about when an employee had to quit.

Q All right, Mrs. East.

With regard to all these documents and research you have done and position papers, do you know of any reason why, professionally, a woman should be terminated in teaching or any other employment with the same type of physical requirements because of pregnancy?

A Well, none whatever.

* * *

[TR. PP. 81-84]

CROSS-EXAMINATION

Q Mrs. East, you have examined the Chesterfield County personnel manual?

A No, sir, I have not.

Q So you are not aware of what the maternity leave policy of Chesterfield County is in this case, is that correct?

A Well, I have gathered this morning from being here and from what I knew about the case before.

Q But you haven't informed yourself of the issue that is before this Court?

A I know about the issues before the Court.

Q As it relates to Chesterfield?

A As it relates in this case.

Q All right.

A It is a fairly common policy. I have investigated some other schools.

Q Now, this one Department of Labor, this is employment contract, isn't it, this exhibit?

A Agreement with the union. The federal government does not enter into contracts with unions as private employers do.

Q Yes, ma'am.

This agreement contains a specific provision relative to maternity leave, does it not?

A Yes, sir.

Q And this specific provision has been approved by the Department of Labor, United States, is that correct?

A Yes, for its own employees.

Q So to the extent that you have been referring to the Acute Conditions and to these other statistics that you have referred to here this morning; the contract doesn't specifically apply to any of those, does it? Only to maternity leave, is that correct?

A For the same, there has been some question, I think, about maternity leave.

* * *

Q What would you say, Mrs. East, insofar as an employer is concerned, is the basic difference between, other than the obvious difference, but the basic difference between the man that breaks his leg on the job and the woman that gets pregnant is what?

A None whatever as far as the employer is concerned.

Q Well now, would it be fair to say that one difference is certainly this: when you are dealing with maternity you know when it is going to happen, don't you? In other words, when a woman goes to her doctor she knows that on such and such a date she is going to have a baby?

A Approximately.

Q Is that true?

A Approximately. Within limits.

Q Now, in addition to all of the days that employees lose, as has been surveyed by the documents which you have or which Mr. Hirschkop has introduced through you to the Court today, in a school board such as the Chesterfield County school board they have to cope with all these unsuspected absences, wouldn't that be a fair statement, they don't know, I mean, when a man goes skiing for a weekend and he breaks his leg and comes in—

A That is true of all employers, yes.

Q But it is not true of someone who becomes pregnant, is it?

A That's right.

Q So when someone becomes pregnant you have an opportunity at that time, and particularly in the teaching profession, you have an opportunity at that time to determine when she is going to stop employment so that you can prepare in an orderly fashion for someone to come behind her and take over where she leaves off, is that fair?

A I say she might be in a position to determine with her doctor when she should. I don't know that the school board should be in that position.

* * *

[TR. PP. 87-93]

Q Mrs. East, what you are saying now is, I think, and you correct me if I am wrong, but what you are saying now is that pregnant women think they are entitled to special benefits even though the Department of Labor and the Courts and everybody else might not think so, but they certainly think that they are entitled to special benefits, isn't that a fair statement?

A No, sir, I don't think pregnant women are and I think council recommended against any special benefits. We don't want pregnant women to have any more benefits than a woman with any other kind of disability or a man with any other kind of disability.

Q Not even when it is a benefit that can be foreseen? I mean it is not like the man with a heart attack. You agree with that at least?

A For purposes of economic job related purposes I see no difference.

Q No difference at all?

A No, not as far as the employer is concerned.

* * *

Q Now, how does this—are these maternity leave provisions, would you say, what you have run into in your wide experience before? I mean generally speaking.

A Well, they seem to be fairly common to school boards. I was rather shocked at what I found at school boards. I don't think this kind of policy is common to other employers, that a woman has to take off this long before childbirth. The only other cases that come to my attention are court cases that involve the Texas Employment Commission that required women to take off two months before and that seemed to me unreasonable, but I had never realized until

we got involved with schools how many schools did this kind of thing. I couldn't understand it. It seemed rather strange. I thought it kind of went back to the days when pregnancy was considered to be obscene or something that shouldn't appear in public after she showed.

Q Have you make any—in other words, in your experience as I understand it, it has been with employment opportunities generally?

A Yes.

Q Not specifically?

A Specifically with schools?

Q Within the teaching profession.

A I went into it thoroughly when I heard about these cases and I was shocked to find that the school systems seemed to be a little bit behind other people.

Q Behind in what way?

A In the sense of denying the woman opportunities to earn money for longer periods of time.

Q You don't think that this agreement recognizes the same?

A Definitely not, sir. It says a woman can work up until the day the baby is born if she is able to perform.

Q You don't think there are two sides of the same coin? You don't think maternity leave—well, let me put it this way.

A I would rather work for the Labor Department than the school board, I would tell you that, sir, looking at the maternity leave policy.

Q Then you would be in favor of no maternity leave policy?

A Definitely, sir. It is only because some people have treated these other cases differently that you need one now, to say certain things aren't true that used to, you know, it should be treated exactly like any other temporary disability.

Q And shouldn't any special provision be made for motherhood, is that correct?

A No, sir, none whatever. The special provisions have hurt women, they have not been protective. They have been discriminatory. All the special provisions we have ever found in law relating to employment and maternity have been discriminatory. I think a lot of people like to believe they are protective.

* * *

JOHN R. KOPKO

was called as a witness by and on behalf of the plaintiff and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. HIRSCHKOP:

Q Please state your name.

A John Kopko.

Q Your address?

A 302 Biltmore Drive, Colonial Heights.

Q What is your position?

A Principal, Midlothian High School.

Q Mr. Kopko, was Mrs. Cohen a good teacher at Midlothian?

A Yes, she was.

Q Now, could I see Plaintiff's exhibit number four? Mr. Kopko, do you recognize this letter?

A I do.

Q Is this the letter you sent to the school board in question?

A It was.

Q Would you please read the letter?

A "In reference to your letter of November 6, 1970 concerning Mrs. Susan Cohen, Mrs. Cohen's effective resignation is December 18, 1970. I would like to request she be permitted to remain until the end of the semester, January 21, 1971. Mrs. Cohen has been in good health up to this time and I feel she will prove effective in her position up to the January 21 date."

Q Thank you.

Mr. Kopko, should Mrs. Cohen return to work would you be willing to have Mrs. Cohen back at Midlothian as a school teacher?

A I would.

* * *

[TR. PP. 100-101]

H. GILPIN BROWN

was called as a witness by and on behalf of the defendants and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By MR. MASON:

Q Will you please state your name?

A H. Gilpin Brown.

Q Where do you reside?

A 8829 Elmer Road, Richmond.

Q By whom are you employed?

A Chesterfield County schools.

Q In what capacity?

A I am a mathematics teacher at Midlothian High School?

Q How long have you held that position?

A This is my fifth year.

Q Do you hold any other positions pertaining to your occupation?

A Well, I am mathematics department head at school. I am a member of the Chesterfield Education Association and chairman of a standing committee which is entitled, Professional Rights and Responsibilities Committee.

Q How long have you been chairman of that committee?

A This is my second year.

* * *

[TR. PP. 103-105]

THE COURT: In other words, the function of your committee is to assist teachers in their, primarily teachers, I know there are others too, but teachers in their relationships with the school officials in the matters that your committee deems to be meritorious? I take it if you had a hearing and you decided they ought to have fired him three months before you wouldn't bother to do anything else, is that right?

THE WITNESS: We would still send our findings and recommendations to the school board, saying that we believe you were justified in your action.

THE COURT: All right. But if you wrote and said, we don't think you were justified, you would hope that they would follow your recommendation.

THE WITNESS: Yes, sir, that is correct.

* * *

Q Has your committee ever considered a proposal for a change in the absent leave policy of Mrs. Cohen?

A Yes, sir, they have. A lot of people, or a few people that were concerned about this policy came in to a C. E. A. meeting, in a building representative's meeting, and asked that the Professional Rights and Responsibilities Committee look into this situation. We did. And we, the committee, got together and drew up a policy and submitted it to the school board.

THE COURT: When you say this situation, are you talking about general leave and disability?

THE WITNESS: No, sir, maternity leave.

THE COURT: Oh. Talking specifically—

THE WITNESS: Yes, sir, maternity leave. I am sorry.

* * *

[TR. PP 107-116]

Q Well, did your committee hear from the teachers within the school system concerning the formation or formulation of this policy?

A No, sir, we did not. You mean did we have a—

Q Did you invite anyone to come in and express their views?

A No, sir, we didn't.

Q And it did not go through the executive committee, is that right?

A No, sir.

Q Does your committee consist both men and women teachers or all women?

A Men and women.

Q Can you give us a breakdown as to the number of men and women?

A I would say it is about probably sixty-four men, maybe.

* * *

Q What is the official policy of the P. R. R. Committee and the V. E. A., the Virginia association?

A I am not sure about this, but I did talk with them and we drew up this policy.

Q What about the National Association of Education?

A I don't know, sir.

Q If the National Education Association took an official stand diametrically opposed to this local county C. E. A. resolution would that affect your judgment as to the reasonableness of it?

A It would affect the judgment. We would have to have a committee hearing and decide.

* * *

Q So they are diametrically opposed to your stance?

A Well, maybe they are, yes, sir.

Q Well, how about the American Association of University Professors, are you aware that they oppose it?

A No.

Q How about the Society of Professors, a national society, are you aware of their position or the A. F. Q. or the U. F. Q., any of the major teacher associations in the United States. Are you familiar with their positions?

A I am not.

Q In reaching this position, then, your committee made no effort to find out what happens in other places, other

than school systems of a like nature to your county school system?

A We did not.

THE COURT: Did you do that?

THE WITNESS: What is that?

THE COURT: Did you check with other systems?

THE WITNESS: Well, we knew what the—we knew that the Richmond and Henrico, at least members of the committee stated that they thought that it was parallel to ours. Now, we did not go out and write a letter or call them up, but members of the committee thought it was parallel to ours.

THE COURT: May I ask you this? It may be a reason, I just don't think anybody has asked you yet, but I want to know. What is the rationale about choosing four months or six months or seven months or three months or two months? I mean, what was the basis of picking a particular time, if you know?

THE WITNESS: Of our decision you mean?

THE COURT: Yes, sir.

THE WITNESS: Well, we felt that if there were some committee members that felt it should be—that it should terminate at four months and there were some that said it should erminate at four months completely.

THE COURT: But can you tell me why? What was the rationale?

THE WITNESS: Well, the rationale was that the sickness—

THE COURT: Sickness?

THE WITNESS: Yes, sir.

THE COURT: Did you have any testimony that there was sickness associated? Because all the evidence before me is that there isn't, that the sickness is all gone by four months.

THE WITNESS: Well, our committee thought there still was some sickness involved. This is our committee. We did not have testimony from medical doctors. We felt also that the health of the mother, especially in elementary schools where they have to run around quite a bit and this kind of thing, might be impaired.

THE COURT: Did you know that this is really diametrically opposed to everything the doctors have said in this case so far?

THE WITNESS: No, sir. We might have known that.

THE COURT: All right, sir.

BY MR. HIRSCHKOP:

Q Did you make any effort at all to determine what the medical evidence was?

A Not professionally, no, sir.

Q There were no doctors on your committee?

A No, sir.

Q So this is more or less an action of your committee that four months or six months is good, isn't that correct?

A Yes, sir.

THE COURT: May I ask one other question? What prompted this?

THE WITNESS: What prompted the four months?

THE COURT: No. What prompted you even considering this particular matter?

THE WITNESS: It was brought up in a building representative's committee—building representative's meeting of the C. E. A. and the Professional Rights and Responsibilities Committee of which I am the chairman was asked to look into it.

THE COURT: Anything to do with this case or was it some other matter that came up or a teacher had a grievance or thought she had?

THE WITNESS: It was several teachers who had a grievance.

BY MR. HIRSCHKOP:

Q Are you familiar with the fact that the state community college systems for all of Virginia does not have such a leave policy at all?

A I am not familiar with that.

Q Are you familiar with the fact that the Arlington Education Association takes a stand different to your own?

A No, sir.

THE COURT: Are you going to put on some evidence to support these positions or are these hypotheticals?

MR. HIRSCHKOP: Yes, sir. I am reading now from leave policies, which is—

THE COURT: That is all right. I just want to know because so far I haven't paid any attention to your question under the theory that it really isn't evidence before me just because you say it or suggest it.

MR. HIRSCHKOP: I have to admit, Your Honor, the community college is only prompted by a conversation I had with someone at lunch.

* * *

MR. HIRSCHKOP: So in summary the committee made no effort to get competent medical testimony or competent statistical evidence or competent evidence from any of the national organizations as to what should be done here, is that correct?

THE WITNESS: That is correct.

* * *

[TR. PP. 118-120]

DIRECT EXAMINATION

BY MR. MASON:

Q Mr. Eanes, would you please state your full name, please?

A Robert Leslie Eanes, Jr.

Q Where do you reside?

A 12137 Chestertown Road, Chesterfield County.

Q By whom are you employed?

A County of Chesterfield.

Q In what capacity?

A County fire chief.

* * *

MR. MASON: Are they immune from fires?

Have any fires occurred in Chesterfield's school system in 1970?

THE WITNESS: Yes, sir, they have. Six in 1970.

BY MR. MASON:

Q Did any fires occur in schools in Chesterfield County in 1969?

A Five.

Q Any fires occur in 1968?

A Three.

Q What about 1967?

A Six.

Q Have all these fires—were there any serious fires?

A Yes, sir. There were some serious fires in this twenty that I have listed.

Q Anybody get injured?

A No, sir, not to our knowledge.

*MR. MASON: That is all. Thank you.

* * *

ROBERT F. KELLY

was called as a witness by and on behalf of the defendants and, having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MASON:

Q Will you please state your name, please?

A Robert F. Kelly.

Q Where do you reside?

A 4901 Southmore Road, Richmond, Virginia.

Q Are you employed by Chesterfield County school system?

A Yes, sir.

Q In what capacity?

A Division superintendent.

* * *

[TR. PP. 127-135]

Q Well, under what rule the pregnant teacher can give the notice anytime up to six months?

A That is correct.

Q What about your understanding of paragraph 5(c)(1), maternity leave must be requested in writing at the time of termination of employee?

A Well, as we said—

Q Does that mean that she has to wait until the day of termination before she can give the notice?

A No. She may give the notice at any time from the first letter when three months' pregnant up to the term when maternity leave commences.

Q As a matter of fact, wouldn't you prefer to have it prior to the date of her actual termination?

A Yes, indeed, in the case of Mrs. Cohen, she asked for it in her first letter.

Q Now, you heard the testimony of Mrs. Cohen this morning, testimony that she missed a number of days. When you add those up it comes to ten. She was absent from October 1 through December 11. Do you know how many school days there are, teaching days, between October 12 and December 11?

A Approximately forty.

Q Forty teaching days. And Mrs. Cohen missed ten of those forty teaching days?

A She did.

Q Do you consider that to be excessive absence?

A I would think so.

Q Does the excessive absence of a teacher—let me rephrase that question.

Does the quality of the education of the students diminish directly in direct proportion to the days' absence of a teacher?

A I think professionally that there is a direct relationship between the continuity of the teaching from one teacher

to a substitute teacher and that when there is major interruption of the teaching process that the students in the particular classrooms suffer. I don't know the percentage, but I do feel that they suffer from not having continuity of teaching.

THE COURT: Mr. Mason, for the Court's benefit, would you tell me the purpose of it? I am not suggesting you not continue, but I want to know the purpose of this.

MR. MASON: The purpose of that question?

THE COURT: Yes, sir.

Well, let me tell you what runs through my mind. Isn't it immaterial, unless it had to do with her pregnancy?

MR. MASON: Your Honor, a teacher is employed to teach children and if it affects the quality of their education, I think the school board—

THE COURT: Listen to my question first. Isn't it immaterial in this case, any absence which, as the doctor says, were excessive in his opinion, isn't that material unless it had to do with pregnancy so far as this case is concerned? Because you have already stipulated she is an excellent teacher.

MR. MASON: But it still has the bearing on the quality of education that the children are getting.

THE COURT: What is the materiality in this particular case?

MR. MASON: Your Honor, we are talking about a school system that employs approximately fourteen hundred teachers and when you get excessive absences—

THE COURT: But that is not why she is not teaching

because of any alleged excessive absences, is it? I don't see the materiality in this particular case.

Go ahead. Maybe there is something I am missing.

MR. MASON: Excessive absence is one of the factors for the rule.

THE COURT: But is there any evidence that the pregnancy brought on the excessive absences? That is the whole point. Do you expect to put on evidence like that?

MR. MASON: We are talking merely about absences, whether it is pregnancy connected or not.

THE COURT: Would you fire her if she had an accident and her leg was injured and she missed ten days?

MR. MASON: No. She would get sick leave.

THE COURT: Would you call it excessive?

MR. MASON: She would get sick leave.

THE COURT: But it still would be excessive, wouldn't it, ten out of forty days?

MR. MASON: Yes, sir.

THE COURT: So I don't see the correlation. Go ahead.

MR. MASON: I asked the question primarily because it affects the quality of education.

THE COURT: I will take notice that children's education, I think, and you correct me if I am wrong, Dr. Kelly, certainly getting a better education when they have the same teacher every day as distinguished from substitutes, isn't that correct?

THE WITNESS: Very clearly.

Q Dr. Kelly, isn't one of the main reasons for the giving of notice and asking for maternity leave to provide continuity in the turnover and change of personnel teaching?

A Yes. It is our main ingredient.

MR. HIRSCHKOP: Pardon me. It is too late to correct this, but on something this vital I would just as soon he not lead that directly.

THE COURT: Overruled. It saves time. He is not going to put words in Dr. Kelly's mouth. Don't you think he is. Go ahead.

MR. MASON: Would you answer the question, please?

THE WITNESS: Would you please repeat the question, Mr. Mason?

By MR. MASON:

Q Isn't part of the reason for the provision which the maternity leave is to give notice in writing and request maternity leave to provide continuity within the school system for the change of personnel?

A Yes, sir. This is the main thesis behind the maternity leave. If we wish and hope to continue the continuity of teaching, there is a point about which we would like to know that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher.

Q Does the fact that teachers are human and report in sick now and again, does that create any confusion for the school system?

A Well, yes, it does, for the individual school principal; because he is responsible for replacing that teacher that particular day, and in some cases the principal has the responsibility that morning, if the teacher calls in sick, of replacing a substitute. And something about this particular

time, it is very difficult to find substitute teachers, so it does cause some disruption of the teaching process.

Q How many teacher are employed at Chesterfield County school system?

A If you count all of the teachers, not just classroom teachers, around fourteen hundred.

Q And of that number how many, if you know, are women?

A I don't know the exact number, but it is about eighty per cent women in Chesterfield County and again—

Q Eighty per cent?

A About eighty percent. Eighty-twenty.

Q And the range of schools in Chesterfield system begin where and end where?

A Kindergarten through twelfth year.

Q What is the present age of kindergarten children?

A Five.

Q What generally would be the age of a student in the senior year of high school?

A Anywhere from at the senior level sixteen through possibly even nineteen.

Q Did you have or was there submitted to you a report of absences pertaining to pregnant teachers some months ago?

A Yes, sir, there was.

Q Was this information used by you in maternity leave requests?

A Per se, no.

Q Did you use this study or this information pertaining to any case at all?

A No.

Q Do you recall what the information was that this study provided?

A Mr. Mason, would you clarify for me "study"? Because we have a number of studies and I have been caught in this trap before.

Q After this case came into existence, I am talking about a report or information that was compiled pertaining to pregnant teachers prior to this.

A There was a study conducted by the personnel department for the 1968-69, 69-70 and 70-71 school years of all pregnant teachers, not only those who had requested maternity leave, but who were pregnant and did not request maternity leave.

Q I am not getting into that yet. I am going back to the original one which frankly none of us knew was in existence.

A All right. The original survey conducted by Mrs. Shirley Stoncham of elementary teachers who were pregnant and had requested maternity leave.

Q What did this information tell you pertaining to pregnant teachers?

A It indicated that during a period following the year of pregnancy that they had, this group of teachers, and offhand I don't remember the number, but this group of teachers had some fifteen days of absences. During the same months the following year in their third, fourth and fifth months of pregnancy, they had some forty-five days of absences. Again, it is completely a study and not a statistical thing in nature, but it did indicate at that time that these teachers were having excessive absences over a similar period, but again, not proof that it was due to pregnancy.

Q All right.

Isn't it important for the school to know in advance if it can when a teacher is pregnant?

A Yes. I think it is because even though we, at the present time, have a surplus of teachers there are still certain areas and certain subject areas that are very difficult to replace. Also, my main problem is of continuity of education, progress, to get a new teacher into the classroom as soon as possible so that that education does continue and we don't have a break.

* * *

[TR. PP. 137-144]

Q Dr. Kelly, what specifically was your approach in connection with Mrs. Cohen?

A Well, I believe, and I hope I am correct, that Mrs. Cohen wrote sometime in October, I believe, about October 26, requesting maternity leave and asking to remain on as a teacher until, I believe, April 1st. This is not in line with the school board regulations. She was told that she would leave at the end of the fifth month which at this particular time happened to run around December 18:

Another request came in from both Mrs. Cohen and the principal requesting that she be able to remain until the end of the first semester, which would have been around January 21. In consultation with the personnel department it was determined that by happenstance we had an applicant with a master's degree and experience equal to Mrs. Cohen, that we could hire the person right after the Christmas vacation, and it was felt at that point that that would be better for the students and the continuity of the program. And her request was denied.

At that point Mrs. Cohen wrote, and I asked—I believe called me, and wanted to know what steps she could take.

I told her if she wished she could come before the school board, which she did, I believe, on the 25th of November. This was not a hearing.

As we stipulated before it was a personal plea on the part of the teacher to the school board.

At that time she again reiterated her statement that her doctor and principal had requested that she remain until the end of the semester. The school board stayed within their reasonable policy and denied her.

Q You do have authority, do you not, under this policy, to extend a pregnant teacher?

A Yes, I do; and I have.

Q What generally is the basis under which you would extend a pregnant teacher?

A The major consideration is the student in the classroom. I keep on saying the continuity of the educational program. In many cases we cannot find a replacement and based on the recommendations of the personnel department we then let the teacher stay on until the end of a semester or the personnel department can find a replacement.

Q Do you know when the present personnel policy manual was accepted by the board?

A I do not. I was not superintendent at that time.

Q This was prior to your time?

A Yes, sir.

Q You didn't have anything actually then to do with the formulation of this policy?

A I did not.

* * *

Q Dr. Kelly, you refer to section 22-217.5 of the Code of Virginia which sets forth conditions under which a contract may be terminated. It does set forth one of the things is incapacity or something shown by competent medical evidence, isn't that correct?

A That is correct.

Q Why did you seek competent medical evidence with regard to this policy of maternity?

A Mrs. Cohen wasn't being terminated or dismissed under this. That policy is strictly dismissal.

Q But you realize that the state has suggested in there that competent medical evidence might be sought where at least that involved termination of employment, whether it is permanent or partial?

A No, I don't read it that way. It says termination, to me is dismissal.

Q All right.

You also said that the state basically runs the schools. Are you not familiar with Article 9, section 133 of the state constitution which says the school board has jurisdiction over that school?

A If I said what you said I said—

THE COURT: I don't think you said that.

THE WITNESS: I hope I didn't.

MR. HIRSCHKOP: I have tried to take notes, Your Honor.

BY MR. HIRSCHKOP:

Q You also said that Mrs. Cohen missed ten days. You know for a fact at least three of those days were for business or religious holidays?

A I know two.

Q Two.

Now, do you have any way of knowing what the other days were for?

A No, I do not. As I just do not—they are for illness, and all the teachers are required to put down is illness.

Q When Mrs. Cohen appeared before the school board, did you make any attempt or any member of the board make an attempt to determine why she was absent those days prior to her appearance?

A That was not the consideration for not extending Mrs. Cohen's maternity leave.

Q Okay. The basic reason you gave on your direct evidence for this policy was a continuity for change of personnel. You said at least two separate places that was the reason. Your testimony was that that was the main reason; is that correct?

A That is true.

Q Was that the main reason when we deposed you? Do you remember being deposed?

A I do.

Q And do you recall what you told us at that time?

A I am not exactly sure of my words, since there were fifty-seven or seventy-five pages.

Q We discussed absentism. Do you recall that?

THE COURT: Refer to the page now.

THE WITNESS: Yes, sir.

By MR. HIRSCHKOP:

Q I refer to page sixty-one at the conclusion of this discussion after absentism.

"Question: What is the rationale of this policy?"

"Answer: The rationale is that at a certain point in a

term of pregnancy a woman becomes physically dependent upon services of a doctor, becomes physically open to harm from students pushing."

"Question: Is there any other rationale? Are they the only two?"

"Answer: All I can think of."

* * *

Q The main reason, it just slipped your mind and yet, twelve pages further on in the deposition do you recall this question and answer. Page seventy-three.

"Question: These are the reasons you have for the policy?"

"Answer: That is right. Well, let me clarify it. They are my interpretation of the policy; the policy was written before I arrived.

"Question: But do you know of any other reasons if you were asked now cold to produce a policy, these are the basic reasons?"

"Answer: At this point, yes."

Was that a truthful answer at that time?

A Yes, sir.

* * *

[TR. PP. 146-147]

THE COURT: What he is suggesting is that that is a reason that occurred to you primarily because of this litigation as distinguished from the reason for the policy. Is that fair?

THE WITNESS: That is a fair statement.

* * *

[TR. PP. 155-158]

Q Does Mrs. Stonham's show anything different?

A No, it does not. We do not have a teacher on board after the fifth month.

Q Then you have no way at all of knowing, do you, what the absentee rate would be after the fifth month?

A I do not.

* * *

Q You have had teachers on occasion teach past the fifth month of pregnancy, haven't you?

A We have.

Q In fact, up until December of this year the policy was to let substitute teachers teach much farther than the fifth month, was it not?

A To let substitute teachers?

Q Yes.

THE COURT: You mean who are expecting, is that what you are talking about?

BY MR. HIRSCHKOP:

Q Yes. Pregnant substitute teachers were allowed to teach past the fifth month?

A If we could not find a replacement for that teacher.

Q What did you do with them during fire drills?

A I suppose they handled themselves exactly as they would handle themselves at any given time.

Q Do you have any reason to believe from any observation or study that a teacher or teachers that were pregnant would handle themselves different than any other teacher?

A We do not have empirical data, no.

Q Now, with regard to illness or other teachers, for instance, if a teacher had a kidney operation, what would guarantee when that teacher returned to school?

A When the teacher felt well enough to return to school.

Q How about a teacher with a broken leg or leg in a cast?

A Similar answer.

Q And this is true of other physical infirmities with the exception of pregnancy, if that is a physical infirmity or disability?

A I don't see it as a physical infirmity. I don't think it is in the same baliwick.

Q Why is it different?

A Because I think the person with the broken leg remains in the school and I do not have to worry about when the termination of a contract takes place and the replacement of that teacher. With the pregnant woman I do. I am concerned for the welfare of the student and the welfare of the school system. And if the teacher can remain up to a point where she feels she can leave, then I am faced with the proposition of hiring a new teacher within a given fifteen or twenty minutes.

Q And this is a strong concern on your part, is it not?

A Yes, as I think back on it, yes.

* * *

[TR. PP. 160-168]

THE COURT: Why are you so concerned with the doctor saying she can come back afterwards and apparently, you don't give much consideration to what the doctor says before, Dr. Kelly?

THE WITNESS: No, we do give consideration to what the doctor says before.

THE COURT: Well, is it fair to say you didn't, in Mrs.

Cohen's case? Because the evidence I have here today is the doctor said she could keep right on working.

THE WITNESS: My answer is, I gave consideration to it. I felt the overriding factor was we had a teacher that could replace Mrs. Cohen.

THE COURT: But the distinction is afterwards, that is it, the doctor says she can come back to work and as I understood your testimony, she can come back.

THE WITNESS: That is true.

THE COURT: But not before that, she couldn't continue to work.

THE WITNESS: That is true.

THE COURT: So you put more importance on what he says afterwards than you do before, is that fair? Well, that is probably not a very good phrase to say importance, but you gave more weight to it after the fact than before it?

THE WITNESS: It would appear we do.

THE COURT: All right.

BY MR. HIRSCHKOP:

Q Now, if she returns to work the day after, who does she teach? Does she go back to the old class?

A No, she does not. She comes back in a position that would be open at that point.

* * *

THE COURT: Do you know what was magic about that particular time?

THE WITNESS: All I know, Judge, is that the school board had a policy that to me was reasonably in line with what I at that present time knew, it was in line with the

school systems I had been previously with, and it was their policy. I adhere to their policy.

THE COURT: Dr. Kelly, let me ask you this. It hasn't come up yet, but most, well, perhaps not most, I don't know, but pregnant women, I guess most, ultimately show. I mean, it is obvious that they are pregnant. Does that have anything—is that any factor? Are we way back in the Middle Ages where there was some stigma of obscenity to a perfectly natural, normal, wonderful thing.

THE WITNESS: Judge Merhige, I would hope that is not the reason.

THE COURT: You don't think that has anything—

THE WITNESS: No, I don't believe it had anything to do with this policy of four months. I don't know exactly the rationale behind it, four months over any other time limit, but I believe that it is a policy that is reasonable at this point.

By Mr. HIRSCHKOP:

Q Well now, are you familiar with Mr. Curtis?

A Yes, I am. He is on the school board.

Q School board member?

A Yes. Brand new school board member.

Q Are you familiar with the fact that one of the reasons he gave is he thinks the appearance of the teacher, for one thing?

A Yes. I read his deposition.

Q Are you familiar with Mr. Wells?

A Yes, I am.

Q You will have to speak up so the court reporter can get it.

A Yes.

Q Are you familiar with Mr. Wells's statement that, yes, because some of the kids say the teacher swallowed a watermelon and things like that, that is not good for the school system? Are you familiar with his testimony to that effect?

A Yes. I read his deposition.

Q How many members on the school board?

A We had six. Now five.

Q So forty per cent of your school board at least thinks it is appearance, do they not?

A Yes, sir.

Q And yet when I asked you about this policy on deposition you said, you follow the policy of the school board, you referred to their reasoning on it, did you not?

A Of the original policy, yes, I still see no reason why the new superintendent should change the policy at this point. I would think it is unreasonable.

Q You would concede if Mr. Wells's sole reason was, as he stated, that the kids might think she had a watermelon in her belly, it would be arbitrary, not talking about legal, but professionally you would know of no reason that would have validity?

A No, I don't.

Q A watermelon in the belly and the other who was asked about the appearance, that has nothing to do with it?

A It does not, no.

Q So if the school board or a substantial part used those reasons they would be arbitrary in a professional sense, would they not?

A They are not professional educators.

Q That may be the problem.

* * *

Q Dr. Kelly, that school system in the State of Virginia, if you can recall, has a policy identical or similar to Chesterfield County?

A In the survey or in the study that I did of the V. E. A. survey of maternity leave provisions in the State of Virginia, I don't have the percentages, Mr. Mason, but I would say that well over sixty per cent of them run within a four months' bracket. Again, I don't know if sixty per cent is right, but a majority of the school systems, I believe, have four months or after the fifth month of pregnancy.

Q And this prevails predominantly throughout the State of Virginia?

A I believe as of that survey that Mr. Hirschkop is going to present—

MR. HIRSCHKOP: I am sorry, Your Honor. It is new and I will be brief.

FURTHER RECROSS-EXAMINATION

By MR. HIRSCHKOP:

Q Some do have a policy, however, where the teacher can teach up until the time of labor if she wants to, do they not?

A I read the survey and I did not see that, Mr. Hirschkop. I am sorry.

THE COURT: Well, doesn't it speak for itself and in the exhibit; don't you have an exhibit that shows?

MR. HIRSCHKOP: Yes, it does.

THE COURT: Well, I am a good reader.

MR. HIRSCHKOP: Thank you.

I will identify it for the Court. It is not numbered, but three leaves from the end, six pages back from the end, is a two-page table.

Just one further thing. Some of them have three months on this table, do they not?

THE WITNESS: They do.

MR. HIRSCHKOP: And some four months?

THE WITNESS: They do.

MR. HIRSCHKOP: And some five months?

THE WITNESS: They do.

BY MR. HIRSCHKOP:

Q Some six months?

A I believe six is the limit.

Q Which is more reasonable? Three, four, five or six months?

A I think it depends upon the particular situation in the judgment of the school board and the policy that they are presently working under.

Q How do these non-professional people, as you termed them before, go about deciding between three, four, five or six months?

A I am sure in this particular case the superintendent of schools, whether it was Dr. Cohen or Mr. Thompson made the recommendation to the supervisors years ago.

Q In the deposition of the school board members every one of them said—you said you read the deposition, everyone said that, we strongly rely upon the recommendation of the superintendent.

A That is true.

Q That is you in this case?

A That is true.

Q How do you go about choosing in your mind as a professional educator the various degrees between three, four, five and six months?

A Mr. Hirschkop, I don't know if there is a basic answer to that question because I think, as you look around the country, you do find four, five, six, seven months. Two, three, four, five, six months. The variance seems to run from school system to school system. I think the rationale depends upon the individual school system and not the state or the country at this time.

Q But other than pure capriciousness can you cite any reason why one school district would differ from the very next school district and why King and Queen should differ from Henrico and why Alexandria should differ from Arlington and Richmond should differ from Henrico?

A I don't think it is capriciousness.

Q Can you, as a professional educator, cite one reason why it should be such a distinction from county to county?

A Because each school system is an agent unto itself and sets its own regulations and its own policies.

Q Other than the fact that it sets its own policies, what would differ from neighboring systems to neighboring systems that would make them have a different policy or set a different policy? What factors can you think of?

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 71-1707

Docket Entries

Appeal from the United States District Court for the
Eastern District of Virginia, At Richmond.

DATE	FILINGS—PROCEEDINGS	FILED
7/27/71	Record on appeal in one volume (Vol. I) filed and appeal docketed.	
7/27/71	Transcript of proceedings in two volumes (Vol. II and Vol. V) filed.	
7/27/71	Exhibits in one envelope received from the clerk of the district court at Richmond, Va. (Vol. III)	
7/27/71	Deposition of Dr. Leo J. Dunn in one volume (Vol. IV) received from the clerk of the district court at Richmond, Va.	
8/3/71	Appearances (3) for the appellants filed and entered.	
8-6-71	Designation of parts of the record to be included in appendix to brief for the appellant received and filed.	
8/12/71	Appearance for the appellee filed and entered.	
8/12/71	Appearance for the appellee filed and entered.	
8/12/71	Depositions of C. Douglas Spencer received from the clerk of the district court at Richmond, Va.	
8/13/71	Appellee's designation of parts of record to be included in appendix filed.	
8/20/71	Amended designation of parts of the record to be included in the record for brief of appellant's filed.	
8/30/71	Supplemental designation of joint appendix filed.	

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- 9/7/71—Brief for appellant filed. 25 copies.
- 9/7/71—Joint appendix filed. 10 copies.
- 9/7/71—Aid to Court filed. 25 copies.
- 9/28/71—Motion for extension of time to file appellee's brief, filed.
- 9/28/71—Order extending the time to file appellee's brief to November 5, 1971 filed.
- 11-3-71—Appellee's motion for further extensions of time for filing appellees brief, filed.
- 11-3-71—Order extending the time to file appellee's brief to November 10, filed.
- 11/9/71—Motion of the U.S. Equal Employment Opportunity Commission for extension of time to file brief as amicus curiae filed.
- 11/9/71—Memorandum of the U.S. EEOC in support of its motion for extension time to file brief as amicus curiae filed.
- 11/9/71—Order granting EEOC leave to file brief as amicus curiae and granting extension of time to file brief on or before November 30, 1971, filed.
- 11/12/71—Brief for appellee filed. 25 copies.
- 11/11/71—Appellant's motion to extend the time to file its reply brief to fourteen (14) days after the brief of Amicus Curiae has been filed, filed.
- 11/12/71—Order extending the time for filing appellant's reply brief, filed.
- 12/2/71—Brief for amicus curiae filed. 25 copies.
- 12/14/71—Reply brief for appellants filed. 25 copies.
- 12-15-71—Notice of oral argument mailed to Gray, Eichler, Hirschkop, Mann, Rudy, Mason, and Gray.

- 1/4/72—Cause argued before Haynsworth, Chief Judge; Winter, Circuit Judge and Young, District Judge, and submitted.
- 1/14/72—Record on appeal in one volume (Vol. I), transcript of proceedings in two volumes (Vols. II & V), exhibits in one envelope, (Vol. III), and deposition of Leo J. Dunn in one volume, (Vol. IV) transmitted to Chief Judge Haynsworth.
- 1/14/72—Discovery deposition of C. Douglas Spencer et al in one volume transmitted to Chief Judge Haynsworth.
- 9-11-72—Record on appeal in five volumes received from Judge Haynsworth.
- 9/14/72—Opinion filed. Chief Judge Haynsworth dissenting.
- 9/14/72—Opinion and Clerk's Memorandum mailed to counsel of record. (Mailed to Mann, Hirschkop, Rudy, Mason, and Gray.) Copy of opinion mailed to the Clerk of the district court at Richmond, Virginia.
- 9/14/72—Judgment of the district court affirmed. Judgment filed.
- 9/28/72—Appellant's petition for rehearing with suggestion for rehearing en banc, filed.
- 1/2/73—Order granting petition for rehearing en banc and case is submitted on briefs and tape of oral argument, filed.
- 1/15/73—Opinion filed. (CFH) Winter dissenting; Craven and Butzner concurring in the dissent.)
- 1/15/73—Copy of opinion mailed to counsel of record. (Mailed to Mann, Rudy, Mason, Gray, Hixon and Clarke.) Copy of opinion mailed to the Clerk of the District Court at Richmond, Virginia.

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- 1/15/73—Judgment of the District Court reversed. Judgment filed.
- 1/19/73—Appearance for the appellants filed and entered.
- 1-29-73—Appellant's verified bill of costs, filed.
- 2/8/73—Certified copy of the judgment and printed copy of the opinion handed the Clerk of the District Court at Richmond, Virginia.
- 2/8/73—Record on appeal in one volume (Vol. I), transcript of proceedings in two volumes (Vols. II and V), exhibits in one envelope (Vol. III), deposition of Dr. Leo J. Dunn in one volume (Vol. IV) and deposition of C. Douglas Spencer returned to the Clerk of the District Court at Richmond, Virginia.
- 2/22/73—Notice evidencing filing petition for writ of certiorari in the Supreme Court filed. (No. 72-1129) (Filed February 15, 1973)
- 4/30/73—Certified copy of order of the Supreme Court granting certiorari April 23, 1973 filed.
- 5/18/73—Record on appeal in one volume, transcript of proceedings in two volumes, disposition in two volumes and exhibits in one envelope received from the clerk of the District Court at Richmond, Va.
- 5/18/73—Certified record in six volumes and exhibits in one envelope transmitted to the Clerk of the Supreme Court.